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IN THE

Supreme Court of the United States

ROBERT LEWIS NORWOOD,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Ninth Circuit erred in finding harmless error where the trial court admitted into evidence an affidavit in violation of the Sixth Amendment which served as a centerpiece of the Government's case in chief.

II. Whether the evidence was sufficient to support Mr. Norwood's conviction for possession of a firearm in furtherance of a drug trafficking crime when there was no evidence that Mr. Norwood dealt drugs from the bedroom in which the gun was found.

III. Whether Mr. Norwood's Due Process Rights were violated when the prosecutor commented on his post-arrest silence during closing arguments.

IV. Whether the crack cocaine sentencing disparity is unconstitutional.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner in this case is Robert Lewis Norwood.

The Respondent in this case is the United States of America.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 8

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT ERRED IN FINDING HARMLESS ERROR WHERE THE TRIAL COURT ADMITTED INTO EVIDENCE AN AFFIDAVIT IN VIOLATION OF THE SIXTH AMENDMENT WHICH SERVED AS A CENTERPIECE OF THE GOVERNMENT'S CASE IN CHIEF 8

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. NORWOOD'S CONVICTION FOR POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME WHEN THERE

WAS NO EVIDENCE THAT MR. NORWOOD DEALT DRUGS FROM THE BEDROOM IN WHICH THE GUN WAS FOUND 16

III. CERTIORARI SHOULD BE GRANTED BECAUSE MR. NORWOOD'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE PROSECUTOR COMMENTED ON MR. NORWOOD'S POST-ARREST SILENCE DURING CLOSING ARGUMENTS 19

IV. CERTIORARI SHOULD BE GRANTED TO REMOVE THE UNCONSTITUTIONAL DISPARITY BETWEEN CRACK AND POWDER COCAINE, WHICH VIOLATES DUE PROCESS PRINCIPLES AND THE EIGHTH AMENDMENT 21

CONCLUSION 25

APPENDIX

Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit, dated April 1, 2010 ..... 1a

Opinion of the United States Court of Appeals for the Ninth Circuit, dated February 17, 2010 ..... 18a

Order of the Supreme Court of the United States, dated November 2, 2009 ..... 34a

Opinion of the United States Court of Appeals for the Ninth Circuit, dated February 18, 2009 ..... 36a

Order of the United States District Court for the Eastern District of Washington, dated December 28, 2007 ..... 51a

Trial Transcript Excerpts 56a

Washington State Employment Security Department Affidavit 81a

TABLE OF AUTHORITIES

Page(s)

Cases

Berger v. United States,
295 U.S. 78 (1935) 19

Chapman v. California,
386 U.S. 18 (1967) 8, 9, 10

Crawford v. Washington,
541 U.S. 36 (2004) 8, 9

Darden v. Wainwright,
477 U.S. 168 (1986) 19

Davis v. Washington,
547 U.S. 813 (2006) 8, 9

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 9, 10

Donnelly v. DeChristoforo,
416 U.S. 637 (1974) 20

Doyle v. Ohio,
426 U.S. 610 (1976) 20, 21

Jackson v. Virginia,
443 U.S. 307 (1979) 8, 9, 16

Melendez-Diaz v. Massachusetts,
557 U.S. __, 129 S. Ct. 2527 (2009) 1, 8, 9, 15

United States v. Krouse,
370 F.3d 965 (9th Cir. 2004) 17, 18

United States v. Lopez,
477 F.3d 1110 (9th Cir. 2007) 18, 19

United States v. Mann,
389 F.3d 869 (9th Cir. 2004) 16

United States v. Nguyen,
565 F.3d 668 (9th Cir. 2009) 15

United States v. Norwood,
555 F.3d 1061 (9th Cir. 2009) 1, 7

United States v. Norwood,
595 F.3d 1025 (9th Cir. 2010) 2, 4, 10

United States v. Olano,
507 U.S. 725 (1993) 16

United States v. Rios,
449 F.3d 1009 (9th Cir. 2006) 16, 17, 18

United States v. Velarde-Gomez,
269 F.3d 1023 (9th Cir. 2001) 15

U.S. Constitution

Amend. V 2

Amend. VI 2

Statutes

18 U.S.C. § 3553(a)(2) 22

18 U.S.C. § 841 ..... 2, 4

18 U.S.C. § 924(c) 4, 19

18 U.S.C. § 924(c)(1) 3, 4, 16

21 U.S.C. § 841(b) 16, 21

21 U.S.C. § 841(b)(1) 21

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

Other Authorities

H.R. REP. NO. 105-344 (1997) 18

Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the S. Comm. on the Judiciary Subcomm. on Crime and Drugs, 111th Cong. (statement of Lanny A. Breuer, Assistant Att'y Gen., Criminal Division, United States Department of Justice) (2009) 24

Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT'G REP. 291 (2007) 21

UNITED STATES SENTENCING COMMISSION, 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY vi (1995) 22

UNITED STATES SENTENCING COMMISSION, 2002 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (2002) 22, 23

UNITED STATES SENTENCING COMMISSION, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT 2-3 (2008) 23

In The Supreme Court of the United States

ROBERT LEWIS NORWOOD, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner, Robert L. Norwood respectfully prays that a writ of *certiorari* issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 1, 2010.

OPINIONS AND ORDERS BELOW

Following a jury trial, Robert Norwood was convicted of possession of cocaine with intent to distribute and possession of a firearm in furtherance of a drug trafficking crime, and was sentenced to imprisonment for 120 months and 60 months, to run consecutively. App. 79a. Mr. Norwood timely appealed his conviction and sentence. The Ninth Circuit issued an opinion affirming the conviction and sentence in *United States v. Norwood*, 555 F.3d 1061 (9th Cir. 2009), attached hereto as App. 36a–50a. This Court granted Mr. Norwood's subsequent Petition for Certiorari, vacated the Ninth Circuit's judgment, and remanded the case for further consideration in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. __, 129 S. Ct. 2527 (2009).

On remand, the Ninth Circuit issued an opinion again affirming the conviction and sentence in *United States v. Norwood*, 595 F.3d 1025 (9th Cir. 2010), attached hereto as App. 18a–33a. Following Mr. Norwood's Petition for Rehearing and/or Rehearing En Banc, the Ninth Circuit issued an amended opinion and denied Mr. Norwood's petition in *United States v. Norwood*, 603 F.3d 1063 (9th Cir. 2010), attached hereto as App. 1a–17a.

JURISDICTION

The Ninth Circuit Court of Appeals affirmed petitioner's conviction and sentence. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

Section 841 of Title 18 of the U.S. Code provides, in pertinent part:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Section 924(c)(1) of Title 18 of the U.S. Code provides, in pertinent part:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime – (i) be sentenced to a term of imprisonment of not less than 5 years.

STATEMENT OF THE CASE

Robert Lewis Norwood was convicted at trial of possession with intent to distribute cocaine (18 U.S.C. § 841) and possession of a firearm in furtherance of drug trafficking (18 U.S.C. § 924(c)). At trial, Mr. Norwood stipulated that he possessed the drugs and, through his attorney, admitted that he was a drug user but denied that he was a drug dealer or that he possessed a gun in furtherance of drug trafficking.

The Government's evidence of drug dealing was sparse and entirely circumstantial. Indeed, the district court characterized the Government's case as "closer to the edge rather than heavy duty." App. 75a. The Government acknowledged that the quantum of drugs recovered from Mr. Norwood was relatively small, but it argued that the jury should infer drug dealing from the large amount of cash Mr. Norwood possessed at the time of his arrest, coupled with his alleged lack of legitimate income.

In order to prove the second half of its argument—that Mr. Norwood had no source of legitimate income to account for the money found in his possession—the Government offered into evidence an affidavit from an employee of the State of Washington who claimed to have undertaken "a diligent search of the department's files" yet was unable to find "any record of wages reported" for Mr. Norwood for the three years preceding his arrest. *Norwood*, 595 F.3d at 1028; App. 5a. At the same time, Mr. Norwood's ex-girlfriend testified that Mr. Norwood did in fact have legitimate income during the relevant period. App. 67a–74a. Specifically, she testified that Mr. Norwood worked part-time

cleaning rental properties, that he had recently received a lump-sum distribution from his prior employer's 401(k) plan, and that he was a successful gambler. *Id.*

Meanwhile, the Government offered no direct evidence of Mr. Norwood's alleged drug dealing. There were no witnesses who claimed to have purchased drugs from Mr. Norwood, nor were there any witnesses claiming to have observed Mr. Norwood selling drugs. Nevertheless, the Government argued that Mr. Norwood must have possessed the gun found under his mattress in furtherance of drug trafficking because the gun was found in proximity to the drugs Mr. Norwood had stipulated to possessing for his personal use.

On appeal, in addition to challenging the sufficiency of the evidence on the firearm conviction, Mr. Norwood contended that the trial court violated his Sixth Amendment right to confront any witnesses against him by admitting testimonial evidence of his employment history through the declaration of a non-testifying witness. *Norwood*, 603 F.3d at 1067; App. 6a. Mr. Norwood also argued that the district court abused its discretion by not declaring a mistrial after the prosecutor argued in closing that Mr. Norwood had failed to tell the police that his marijuana "blunts" were laced with crack cocaine. *Id.* at 1067-68; App. 6a. Finally, in order to preserve issues for Supreme Court review, Mr. Norwood challenged the constitutionality of his mandatory minimum sentence for crack cocaine. *Id.* at 1070-71. App. 12a–13a.

The facts of the case are as follows: Police responded to a domestic violence call at the residence

of Mr. Norwood's ex-girlfriend, Rebecca Holiday, where they found Mr. Norwood lying on a bed. *Id.* at 1066; App. 4a. The police smelled marijuana and Mr. Norwood admitted that he had just smoked a "joint," at which point the police arrested him and conducted a search incident to arrest. *Id.* Police retrieved 0.86 grams of crack cocaine and $2,531 in cash from Mr. Norwood's pants pocket. *Id.*

In Mr. Norwood's vehicle, police found a duct tape ball containing $7,000 in cash, separated into $1,000 bound rolls, but no drugs. *Id.* at 1067; App. 4a. In Mr. Norwood's bedroom, police found a metal plate and digital scale with drug residue and two baggies containing 7.7 grams of crack cocaine. *Id.* Police also found a wood box with several burned marijuana blunts. *Id.* Police did not seize the box or the blunts, nor did they test the blunts for traces of crack cocaine. *Id.* Between the mattress and box spring, police found a .25 caliber handgun. *Id.*

At trial, Ms. Holiday testified that at the time of his arrest, Mr. Norwood was smoking marijuana on a daily basis using a "blunt," or marijuana wrapped in cigar paper. App. 62a–64a. While she had never seen Mr. Norwood sell or use crack cocaine, she suspected that he had recently begun smoking crack because of his irrational behavior. *Id.*

A detective from the Washington State Patrol was allowed to testify regarding the quantum of drugs typically characterized as a "user" amount. App. 58a–61a. The detective acknowledged that 7.7 grams of cocaine, the amount found in Mr. Norwood's bedroom, constituted a "user" amount and that crack cocaine could be added to marijuana and smoked in that manner. *Id.*

With respect to Mr. Norwood's income, Ms. Holiday testified that Mr. Norwood did not keep a bank account. App. 68a–74a. He worked part-time cleaning rental properties, gambled successfully, and had recently received a significant retirement check. *Id.* Meanwhile, the detective from the Washington State Patrol testified that he had received the disputed affidavit from an employee at the Washington Department of Employment Security indicating that a diligent search had been conducted that produced no record of legitimate income for Mr. Norwood for the three years immediately preceding his arrest. App. 81a.

Following Mr. Norwood's conviction, the district court imposed a mandatory minimum sentence of 10 years for Mr. Norwood's conviction for possession with intent to distribute cocaine base, plus a mandatory minimum five years, to be served consecutively, for his conviction on possession of a firearm in furtherance of drug trafficking. *Norwood*, 555 F.3d at 1065; App. 6a, 79a. While acknowledging that it was bound by these mandatory sentences, the district court indicated that if it had discretion, it might consider a different sentence, noting that Mr. Norwood's prior offense was more than 10 years old and he would be 68 years old when he was released under the mandatory minimum sentences. App. 79a.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should be Granted because the Ninth Circuit Erred in Finding Harmless Error Where the Trial Court Admitted into Evidence an Affidavit in Violation of the Sixth Amendment Which Served as a Centerpiece of the Government's Case in Chief

Over the last seven years, this Court has reinforced the right of criminal defendants to confront any witnesses against them. *See Melendez-Diaz*, 129 S. Ct. 2527; *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004). However, this right comes to little where an appellate court finds harmless error even when unconstitutionally admitted evidence is made a centerpiece of the Government's case against a defendant. The Ninth Circuit panel below reached just such a conclusion. After prosecutors built their case largely around an affidavit that even the Government concedes was admitted in violation of the Sixth Amendment, the Ninth Circuit found that wrongful admission to be "harmless."

This miscarriage of justice was made possible by the Ninth Circuit's improper application of the harmless error standard set out by this Court in *Chapman v. California*, 386 U.S. 18 (1967). Specifically, the Ninth Circuit effectively substituted the more lenient "sufficiency of the evidence" standard from *Jackson v. Virginia*, 443 U.S. 307 (1979) in place of the *Chapman* standard and then, when apprised of its mistake, simply amended the language of its decision without altering its analysis. As a result, the Ninth Circuit stood by its

harmlessness finding despite the significance of the evidence that all sides acknowledge was wrongfully admitted.

Consequently, here, for the first time since its ruling in *Melendez-Diaz*, this Court has an opportunity to address when the admission without confrontation of testimonial evidence in the form of an affidavit constitutes harmless error, particularly when that evidence is central to the prosecution's case. *See Melendez-Diaz*, 129 S. Ct. at 2542 n.14; *Davis*, 547 U.S. at 829; *Crawford*, 541 U.S. at 42 n.1.

When evidence has been unconstitutionally admitted, reversal on direct appeal is not a question of whether the error was "'outcome determinative,'" or even whether it "created a reasonable possibility that the jury returned an inaccurate guilty verdict." *Delaware v. Van Arsdall*, 475 U.S. 673, 679–80, 684 (1986). Instead, reversal is required unless the Government "prove[s] beyond a reasonable doubt" that the error in question did not even "*contribute* to the verdict obtained." *Chapman*, 386 U.S. at 24 (emphasis added). *Chapman's* demanding standard lies in stark contrast to the sufficiency of the evidence standard articulated in *Jackson*, which merely asks whether, considering "the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

Initially, the Ninth Circuit explained that the admission of the affidavit was harmless error because "disregarding the affidavit entirely, the evidence against Norwood on the elements of the offense of possession of cocaine base with intent to

distribute was sufficient to establish his guilt beyond any reasonable doubt." *Norwood*, 595 F.3d at 1031; App. 26a. This language closely tracks the lesser standard set out in *Jackson*. Mr. Norwood highlighted the error in the court's analysis in his Petition for Rehearing And/Or Rehearing En Banc. In response, the Ninth Circuit "amended" its opinion, but did so only by tweaking its language—not its analysis—to suddenly conform to the more demanding *Chapman* standard.

Notwithstanding its "swapping out" of the appropriate standard from *Chapman*, the Ninth Circuit's analysis and conclusion cannot be squared with the reality of what transpired at trial. Indeed, the record in this case forecloses any possibility that the constitutional violation at Mr. Norwood's trial was "so unimportant and insignificant" as to be "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 22, 24. Specifically, the significance of the wrongfully admitted affidavit is borne out by (i) the affidavit's centrality to the Government's effort to prove one of the key issues at trial (whether Mr. Norwood had a legitimate source of income); (ii) the absence of evidence corroborating the affidavit (on the contrary, the affidavit was contradicted by a defense witness); and (iii) the overall weakness of the Government's theory that Mr. Norwood was a narcotics dealer and not just a narcotics user. *See Van Arsdall*, 475 U.S. at 684 (setting out factors relevant to harmlessness inquiry).

There was never any dispute that Mr. Norwood possessed the narcotics in question. The issue at trial was whether Mr. Norwood was merely a narcotics user (as the defense contended) or

whether he was a narcotics dealer (as the Government argued). The consequences of that distinction are devastating. With a firearm at the scene, the conviction on the possession-with-intent-to-sell charge carried a statutory mandatory minimum sentence of fifteen years in federal prison, whereas a conviction for the lesser included offense of mere possession would have yielded a fraction of that penalty. As noted above, the Government introduced no direct evidence that Mr. Norwood sold narcotics. No witness claimed to have purchased narcotics from him. No witness claimed to have observed him selling narcotics to others. *See, e.g.*, App. 54a (District Court's post-trial observation that "there was no direct evidence that anyone ever purchased drugs from the Defendant or saw him sell drugs"). Rather, the Government's case rested on two pieces of circumstantial evidence. The first was a small digital scale with narcotics residue. Referencing testimony by one of the Government's witnesses, defense counsel argued that Mr. Norwood used the scale to weigh narcotics that he purchased for his own use:

> Something else [Detective] Taylor said that was very interesting. He said [that] dealers weigh [narcotics] because they don't want to short anybody, because if you short someone, if you short your customer, you could be in a world of hurt.
>
> Well, now, how would a customer know if he has been shorted unless he weighed it. He would have to weigh it to know he had been shorted.

> So why is it inconceivable that a user would have a scale? . . . Especially if you are buying Costco style marijuana.

App. 77a (Defense's closing argument).

The second piece of circumstantial evidence on which the Government's case rested was the cash found in Mr. Norwood's vehicle and on his person at the time of his arrest. The Government argued that this cash was proof that Mr. Norwood was a narcotics dealer—a theory that depends, at a minimum, on Mr. Norwood having no legitimate source of income. To establish that necessary logical predicate, the Government introduced the disputed affidavit of the Washington state employee, rather than calling a witness to testify at trial. *Norwood*, 603 F.3d at 1067; App. 5a. The employee claimed in her affidavit to have undertaken "a diligent search of the department's files" yet was unable to find "any record of wages reported" for Mr. Norwood for more than three years preceding his arrest. *Id.* The affidavit provides no information concerning the type of wages that may not be reported to the Department of Employment Security, such as cash income earned "under the table," gambling winnings, or retirement plan distributions. Nor does the affidavit describe how the employee conducted the search.

The unlawfully admitted affidavit was a centerpiece of the Government's case throughout trial, as previewed in the Government's opening statement:

> One of the bits of evidence you will hear about in this case is that for

> all of us who work legitimate jobs, our employers report our income to what is called the Department of Employment Security.
>
> So they tell the State of Washington, okay, this person is employed, here is how much they made this year. Those records for the defendant showed that he hadn't had a job, no legitimate reported income, since 2004.

App. 57a (Government's opening statement).

To rebut the Government's contention that Mr. Norwood had no legitimate source of income, the defense called Mr. Norwood's girlfriend, Ms. Holiday, to the stand. Ms. Holiday testified that she never knew Mr. Norwood to sell narcotics, App. 64a–66a, and she offered three plausible explanations for the cash found in his possession:

First, Ms. Holiday testified that prior to Mr. Norwood's arrest, he was in possession of a $5,000 retirement check from his former employer. App. 67a–74a.

Second, Ms. Holiday testified that Mr. Norwood gambled "[a]t least once a week," and he was "[m]ore successful than not" when he gambled. *Id.* She further testified that Mr. Norwood used his gambling winnings to pay bills and was saving his winnings to pay for his daughter to fly in from Australia to visit him. *Id.*

Third, Ms. Holiday testified that Mr. Norwood worked part-time at cleanup jobs for which he may have been paid in cash. *Id.*

The Government's closing argument to the jury again emphasized the inexplicable source of the cash, claiming that there was no source for that income other than drug trafficking:

> What we introduced to you was evidence that the Department of Employment Security when someone works a legitimate job, employer [sic] reports their income and there is evidence that they have been employed for a period of time.
>
> We know from the evidence in this case and what was introduced as to the defendant, that he hasn't worked in a legitimate job in Washington State since at least 2004.
>
> So how is it that you don't have a job since 2004, you have got a house, you have got a couple of cars, you have got drugs, you have got a gun, you have got kids apparently you are paying for, and you have got that much cash?
>
> Just inexplicable. There has been no reasonable explanation for that except that he was involved in drug trafficking. . . . There is no evidence that he was out earning a legitimate income anywhere.

App. 76a (Government's closing argument).

The jury deliberated for nearly five hours—longer than the sum total of testimony by all eight trial witnesses. The jury sent two notes to the Court prior to announcement of the verdict. The second note in particular (sent after nearly four hours of deliberations) concerned the distinction between using narcotics and dealing narcotics: "Please give us the definition of 'distribution.' Does distributing have to involve a monetary exchange?"

There can be no assurance (and certainly no assurance "beyond a reasonable doubt") that the unlawfully admitted evidence did not influence the jury's verdict. See, e.g., *United States v. Velarde-Gomez*, 269 F.3d 1023, 1035–36 (9th Cir. 2001) (en banc) (refusing to find harmless error even where the alternative theory proffered by the defense was "not necessarily compelling"); *United States v. Nguyen*, 565 F.3d 668, 675 (9th Cir. 2009) ("While the jury could have concluded that [the defendant] knew the [items] were stolen absent the [improperly admitted] hearsay testimony, the government has not proven that the jury would have so concluded beyond a reasonable doubt."). It follows that the Ninth Circuit erred in concluding that the admission of the affidavit was harmless error when it engaged in an analysis perhaps proper to a sufficiency of the evidence inquiry under *Jackson* but entirely out of place in a *Chapman* harmless error analysis.

In order to rectify the Ninth Circuit's error, and to clarify the proper application of *Chapman*'s harmless error analysis to the unconstitutional admission of testimonial evidence against a criminal defendant in light of this Court's recent ruling in *Melendez-Diaz*, this Court should grant *certiorari*.

See United States v. Olano, 507 U.S. 725, 731 (1993) (granting *certiorari* in order to clarify the proper application of error analysis on appeal).

II. Certiorari Should be Granted because the Evidence Was Insufficient to Support Mr. Norwood's Conviction for Possession of a Firearm in Furtherance of a Drug Trafficking Crime When There was No Evidence That Mr. Norwood Dealt Drugs from the Bedroom in Which the Gun Was Found

Mr. Norwood's conviction included possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. 924(c). As a result, the district court was required to impose a mandatory five-year sentence, consecutive to the ten-year mandatory minimum under 21 U.S.C. § 841(b). However, there was absolutely no evidence that Mr. Norwood possessed the firearm "in furtherance of" the alleged dealing. The central question in assessing whether a constitutionally sufficient quantum of evidence was produced is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

Under Section 924(c)(1)(A), the Government was required to show that Mr. Norwood was trafficking crack cocaine and possessed the gun in furtherance of that crime. *United States v. Rios*, 449 F.3d 1009, 1012 (9th Cir. 2006). Simple possession of a gun by an individual convicted of a drug trafficking crime is not enough. *Id.* (citing *United States v. Mann*, 389 F.3d 869, 879-80 (9th Cir. 2004), and *United States v. Krouse*, 370 F.3d 965, 967 (9th Cir.

2004)). "Instead, the government must show that the defendant intended to use the firearm to promote or facilitate the drug crime." *Id.* This intent is demonstrated by showing a nexus between the gun recovered and the drug trafficking crime. *Id.*

Police found a firearm in Mr. Norwood's bedroom, under the mattress, a few feet from a "user amount" of crack cocaine. *Norwood*, 603 F.3d at 1067, 1072. The Government's own expert admitted that 7.7 grams of crack was the equivalent of a quarter ounce, an amount commonly purchased by drug users. App. 58a–60a. And, although police found a scale in Mr. Norwood's bedroom, there was no other evidence that Mr. Norwood had ever stored a larger amount of drugs there. Nor was there any evidence of packaging materials in the room.

The only evidence that Mr. Norwood was dealing drugs at all was the money found on his person and in his car. There was no evidence that Mr. Norwood had ever sold drugs from his room or, more specifically, while he was armed with the firearm. Indeed, Mr. Holiday testified that she had never seen Mr. Norwood deal crack cocaine anywhere, much less in the house. App. 62a–65a.

When it amended the statute in 1998 to add the "in furtherance of" provision, Congress specifically noted that the provision:

> requires the government to "clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular

> mandatory sentence. Rather, the government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity."

Rios, 449 F.3d at 1013 (quoting H.R. REP. NO. 105-344, at 6 (1997)).

No such "specific facts" were present. Instead, the Government's case was based entirely upon the general notion that drug dealers possess guns for protection and intimidation. Such speculative "evidence" could support a conviction in any case where a drug dealer possessed a firearm; such a result was not the Congressional intent underlying the statute. *Id.* at 1014.

In upholding the sufficiency of this evidence, the Ninth Circuit relied on *Krouse*, 370 F.3d at 968, for the proposition that the Government has provided adequate evidence of a nexus between the firearm and the drug crime by showing that the firearm is in the same room and "within easy reach" of a "substantial quantity of drugs and drug trafficking paraphernalia." However, *Krouse* is profoundly distinguishable from this case: the defendant in *Krouse* was found with 86.5 grams of cocaine and almost 150 pounds of marijuana. *Id.* at 966. Mr. Norwood, on the other hand, was found with an amount the Government's own expert testified was consistent with mere personal use.[1]

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[1] The Ninth Circuit also cited *United States* v. *Lopez*, 477 F.3d 1110, 1115 (9th Cir. 2007) as supporting its conclusion. In *Lopez*, the defendant was found driving in a car with a firearm

This Court should grant *certiorari* in order to resolve this marked expansion of the law surrounding sufficiency of the evidence, as well as the expansion of the reach of 18 U.S.C. §924(c). Absent other indicia of drug dealing, the Ninth Circuit's rationale in this case approaches strict liability for those who simultaneously possess guns and a mere "personal use" quantity of drugs. The statute and case law do not support such a result.[2] Because it is clear that the statute was not intended to criminalize possession of a firearm in mere proximity to drugs, *certiorari* should be granted.

III. Certiorari Should be Granted because Mr. Norwood's Due Process Rights Were Violated When the Prosecutor Commented on Mr. Norwood's Post-Arrest Silence During Closing Arguments

A prosecutor's duty in a criminal case is to seek justice, not to obtain a conviction by "improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88 (1935). When such methods are employed and "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process,'" it justifies a mistrial or reversal of the conviction. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)

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and divided packets of cocaine just after being seen brandishing the handgun. *Id.* at 1111-12.

[2] To the extent that the Ninth Circuit attempted to base its decision on the money found in Mr. Norwood's possession, that evidence is questionable in light of the erroneous admission of the affidavit allegedly showing that there was no legitimate source of income.

(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

The central issue at trial was whether Mr. Norwood was simply a drug user or, as the Government argued, a drug dealer. Mr. Norwood, through his counsel, argued that the crack cocaine found in his bedroom was solely for personal use. The Government countered that it could not have been for personal use because crack cocaine is generally smoked in glass pipes, and no pipes were found in the house. In response, Mr. Norwood's counsel elicited testimony from the Government's own expert that crack can be added to marijuana blunts and smoked in that fashion. App. 61a.

During closing argument, defense counsel suggested that this theory could not be disproved because the police had failed to seize or test the marijuana blunts found next to Mr. Norwood's bed. The Government responded by acknowledging that it would have been nice if the police had seized the blunts, "but you know what, the defendant didn't tell them that he was smoking the marijuana with the crack cocaine." *Norwood*, 603 F.3d at 1067.

The prosecutor's comment was blatant misconduct. It is beyond peradventure that prosecutors are prohibited from commenting on a defendant's silence during closing arguments. *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976). "[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618. In addition to violating the Fifth Amendment right to remain silent, the use of a defendant's post-arrest silence violates the

defendant's due process rights and is grounds for reversal. *Id.* at 618-620.

IV. Certiorari Should be Granted to Eliminate the Unconstitutional Disparity Between Crack and Powder Cocaine, Which Violates Due Process Principles and the Eighth Amendment

The Due Process Clause of the Fifth Amendment, in concert with the Eighth Amendment's prohibition against cruel and unusual punishment, bars the arbitrary sentencing distinction between crack and powder cocaine contained in 21 U.S.C. § 841(b). "No issue in the world of federal sentencing has sparked more controversy or engendered more criticism than the punishment scheme for crack and powder cocaine." Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT'G REP. 291, 291 (2007).

Under § 841(b), a person who is convicted of possessing at least five grams of crack cocaine with the intent to distribute, with one prior felony drug offense on his record, must receive a mandatory minimum sentence of ten years. 21 U.S.C. § 841(b)(1)(B)(iii). But a person convicted of possessing only five grams of powder cocaine, with one prior conviction, would not be subject to any mandatory minimum sentence. Instead, it would take 500 grams of powder cocaine to receive the same ten-year mandatory minimum sentence. 21 U.S.C. § 841(b)(1)(B)(ii).

It is now well-documented and generally accepted that this distinction is arbitrary. Since 1995, the United States Sentencing Commission has

repeatedly observed that crack and powder cocaine "are two forms of the same drug, containing the same active ingredient." *See* UNITED STATES SENTENCING COMMISSION, 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY vi (1995). Indeed every concern raised by Congress in its frenzied enactment of the Anti-Drug Abuse Act of 1986 has been refuted by the Sentencing Commission. In a 2002 report to Congress, the Sentencing Commission emphatically stated:

> After carefully considering all of the information currently available - some 16 years - after the 100-to-1 drug quantity ratio was enacted - the Commission *firmly* and *unanimously* believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act.

UNITED STATES SENTENCING COMMISSION, 2002 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (2002) [hereinafter 2002 Commission Report] (emphasis added).

The Commission then applied this information to the general sentencing goals set forth in 18 U.S.C. § 3553(a)(2). After evaluating "the current federal cocaine penalty structure in light of those general and specific objectives" the Commission concluded that the current sentencing guidelines for crack cocaine: (1) "exaggerate the relative harmfulness of crack cocaine"; (2) "sweep too broadly and apply most often to lower level offenders"; (3) "overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality"; and

(4) disproportionately impact minorities. 2002 Commission Report at v-viii. The Commission concluded by recommending an increase in the threshold quantity of crack cocaine necessary to invoke the mandatory minimum sentences. *Id.* at viii.

In response to Congress's continued inaction, the Sentencing Commission amended the federal sentencing guidelines on May 1, 2007 to reflect its oft-articulated frustration regarding the crack and powder cocaine disparity. The amendments adjusted the base offense levels downward by two levels and the Commission applied the change retroactively. *See* UNITED STATES SENTENCING COMMISSION, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT 2-3 (2008) [hereinafter 2008 Commission Report].

Following the retroactive application of the crack cocaine amendments, the Sentencing Commission issued a report analyzing recent court decisions regarding motions to reduce sentences for qualifying offenders, including the racial makeup of those affected by the amendment. 2008 Commission Report at 4-14. "Table 5" illustrates the racial disparity inherent in the crack and powder cocaine distinction. Of the 10,340 offenders considered for a sentence reduction under the amendment, 93.2% were Black or Hispanic. *Id.* at 8. This statistic further emphasizes the crack and powder distinction's bias towards minority offenders.

The issue has recently been in the news as well. Just recently, the Senate conducted hearings regarding the disparity during which the Department of Justice announced its attempt to try

and bring about legislation eliminating this disparity. *See Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the S. Comm. on the Judiciary Subcomm. on Crime and Drugs*, 111th Cong. (statement of Lanny A. Breuer, Assistant Att'y Gen., Criminal Division, United States Department of Justice) (2009).

Mr. Norwood is yet another victim of the arbitrary and racially disparate crack to powder distinction. He is an African-American male, sentenced to a mandatory minimum ten-year sentence, leaving behind a young child and family. Rather than curb the proliferation of cocaine use, the crack to powder distinction injures communities, specifically minority communities.

Despite the empirical evidence that crack and powder cocaine are homogeneous, to date Congress refuses to eliminate the disparity in sentences. This failure to act is arbitrary because it is not based upon a rational, scientific basis. It follows that the disparate sentences between crack cocaine and powder cocaine convictions are arbitrarily disproportionate and, in turn, unconstitutional.

CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-30050
D.C. No. CR-06-00091-LRS
April 1, 2010

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

ROBERT LEWIS NORWOOD, Defendant-Appellant

ORDER AND AMENDED OPINION

On Remand from The United States Supreme Court

Filed February 17, 2010
Amended April 1, 2010

Before:

THOMAS M. REAVLEY*, SENIOR CIRCUIT JUDGE, AND RICHARD C. TALLMAN AND MILAN D. SMITH, JR., CIRCUIT JUDGES.

Opinion by:

JUDGE MILAN D. SMITH, JR.

*The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Appeal from the United States District Court for the Eastern District of Washington

Lonny R. Suko, District Judge, Presiding

AFFIRMED.

ROBERT J. PFISTER AND ANDREW B. BRETTLER, Simpson Thacher & Bartlett LLP, Los Angeles, California, *for the defendant-appellant.*

JAMES A. MCDEVITT AND K. JILL BOLTON, United States Attorney, Spokane, Washington, *for the plaintiff-appellee.*

ORDER

The opinion filed on February 17, 2010 is amended as follows:

On slip opinion page 2510, the first sentence of the second paragraph at Headnote [4] is deleted, and replaced with the following: "In sum, we are convinced beyond any reasonable doubt on the basis of all the remaining evidence adduced at trial that the jury would have convicted Norwood on the elements of the possession with intent to distribute offense regardless of the challenged affidavit."

With this amendment, the panel has unanimously voted to deny the petition for panel rehearing. Judges Tallman and M. Smith have voted to deny the petition for rehearing en banc, and Judge Reavley has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing may be filed.

OPINION

MILAN D. SMITH, JR., *Circuit Judge*:

In this appeal, Defendant-Appellant Robert L. Norwood challenges his jury conviction for possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). Norwood claims violation of his Sixth Amendment right to confront his accuser and violation of his due process rights both in trial and at sentencing. Norwood also claims that the evidence was insufficient to convict him for possession of a firearm in furtherance of a drug trafficking crime.

We affirmed Norwood's conviction and sentence in *United States v. Norwood*, 555 F.3d 1061 (9th Cir. 2009). The matter is again before us on remand from the United States Supreme Court. The Court vacated our earlier opinion and remanded for reconsideration of Norwood's Confrontation Clause claim in light of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). We again affirm Norwood's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

In April of 2006, police responded to a domestic violence call in Spokane, Washington. Upon entering the home, the police encountered Norwood in the bedroom lying on his bed. They smelled marijuana, and asked Norwood to step outside. In response to police questioning, Norwood admitted he had "just smoked a joint," but denied having any other drugs in the bedroom. The officers then arrested Norwood, and while searching him discovered 0.86 grams of crack cocaine and over $2500 dollars in his pockets.

After obtaining a warrant, the police searched Norwood's home and vehicle. In the car, police found $7000 in cash, separated into $1000 tightly wrapped bundles. In the bedroom, the police discovered two baggies containing a total of 7.7 grams of cocaine base and a digital scale dusted with drug residue underneath the dresser next to the bed. Police also found a wood box containing several "marijuana blunts," or butts of marijuana joints. In the closet, police found 42.4 grams of harvested marijuana in an ice cream box. Between the mattress and the box spring of the bed, police found a 25 caliber semiautomatic handgun. The police did not find any other drug paraphernalia.

On August 2, 2007, Norwood was indicted in federal district court on three counts: (1) being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e); (2) possessing cocaine with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 2; and (3) possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). The government eventually dismissed the first count

and proceeded to trial on the second and third counts. Norwood made a Federal Rule of Criminal Procedure 29 motion to dismiss at the close of the government's case, another at the close of the defendant's case, and still a third following trial, each of which was denied.

As part of its case-in-chief, the government presented an affidavit prepared by Jodi Arndt, an employee at the Washington Department of Employment Security, which certified that "a diligent search of the department's files failed to disclose any record of wages reported for [Norwood] from January 1, 2004 through March 31, 2007." Although Arndt did not appear in person to testify, the court admitted her affidavit as circumstantial evidence that Norwood had no legal source for the large amounts of cash that were found on his person and in his car.

During closing argument, Norwood's counsel argued to the jury that the drugs found in Norwood's apartment were for personal use, and suggested that Norwood had been smoking the crack through the marijuana blunts that were found on the scene, but which had not been seized or tested. The prosecutor responded to the defense's comments as follows: "When we talk about those blunts, yeah, it would have been real nice if the police got those. The police didn't get those, but they admitted that, but you know what, the defendant didn't tell them that he was smoking the marijuana with the crack cocaine." The defense immediately objected and moved for a mistrial on the basis that Norwood's right to silence had been violated. The district court sustained the objection and directed the jury not to consider the

prosecution's comment. The court denied the motion for a mistrial.

On October 31, 2007, the jury returned a verdict of guilty on both counts. The district court sentenced Norwood to 120 months in prison for Count 2 and 60 months for Count 3, to run consecutively. Norwood appealed to this court.

STANDARD OF REVIEW

Norwood alleges that his Sixth Amendment right to confront his accusers was violated when the district court admitted into evidence a written affidavit without requiring the affiant to testify on the stand. We review admission of a declarant's out-of-court statements de novo to test for possible violations of the Confrontation Clause. *Lilly v. Virginia*, 527 U.S. 116, 137 (1999). If a constitutional violation has occurred, we then review for harmless error. *Chapman v. California*, 386 U.S. 18, 21-22 (1967).

Norwood also alleges that the prosecution's reference to the fact that he had not spoken with police officers regarding possible use of cocaine in the marijuana blunts violated his due process rights. We review a claim that the prosecution's comment has violated the defendant's right to silence de novo. *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001). If the prosecution's comment is determined to be improper, we then apply harmless error review. *Id.*

Finally, Norwood argues that the evidence was insufficient to convict him on the count of possession of a firearm in furtherance of a drug trafficking crime. When the defendant has moved for a

judgment of acquittal after the close of evidence, this court reviews denial of the motion de novo. *United States v. Rios*, 449 F.3d 1009, 1011 (9th Cir. 2006). We will not overrule a conviction if " 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

DISCUSSION

I. Claimed Violation of Norwood's Sixth Amendment Rights

The Sixth Amendment of the U.S. Constitution guarantees an accused the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Supreme Court has interpreted this right to apply to out-of-court statements as well as in-court testimony. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). As the Court summarized in *Crawford*, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59.

The Supreme Court has yet to define the full extent to which rights under the Confrontation Clause are applicable to testimonial and nontestimonial statements. However, in *Melendez-Diaz*, the Court provided additional guidance, concluding that "certificates of analysis" verifying the identity of a contraband chemical substance are testimonial under *Crawford*. 129 S. Ct. at 2531, 2532. Quoting *Crawford*, the Court explained that the "certificates of analysis" (which are "quite plainly

affidavits") are "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact" and "functionally identical to live, in-court testimony." *Id.* (internal quotation marks omitted). Accordingly, *Melendez-Diaz* held that such affidavits are inadmissible unless the affiant testifies at trial, or is unavailable at trial but had earlier been available for cross-examination. *Id.*

In this case, the government concedes that under *Melendez-Diaz*, Washington Department of Employment Security Assistant Records Officer Jodi Arndt's affidavit, prepared for use at Norwood's trial to prove the absence of any record of Norwood having legitimate employment, should not have been admitted without Arndt presenting herself at trial for examination.

In light of the government's concession that admission of Arndt's affidavit violated Norwood's Sixth Amendment rights, we must remand for a new trial unless the government demonstrates beyond a reasonable doubt that admission of the evidence was harmless. *Chapman*, 386 U.S. at 24.

> Whether such an error is harmless in a particular case depends upon a host of factors . . . includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Under the circumstances of this case, the government has met its burden. Unlike the affidavit in *Melendez-Diaz*, the affidavit in this case was not offered to prove an element of the offense, nor was it the *sole* evidence of any relevant fact. Rather, the testimony provided by the disputed affidavit was not particularly important to the case, and was cumulative.

Specifically, the affidavit was offered to prove the lack of any record that Norwood had legitimate employment that might explain his possession of $7,000 in cash stored in separate rolls of $1,000, bundled in duct tape, in the center console of his vehicle, and another $2,531 in cash on his person.

The amount of cash and Norwood's method of storing it strongly suggest that the money did not derive from a legitimate source. Further, the jury heard evidence from Norwood's girlfriend that he rarely left the house during the day, did not receive paychecks from any regular employment, and that his only job involved occasional cleaning of rental units. Thus, Norwood's girlfriend's testimony established the same fact as the disputed affidavit—that Norwood did not have any sort of job that would have led to employment records with the state—making the affidavit merely cumulative. Thus, although the government relied on the affidavit in arguing to the jury that the cash could not have derived from a legitimate source, the government could have made precisely the same argument based on the testimony of Norwood's girlfriend. Accordingly, the district court's admission of the

affidavit, and the government's reliance on it, were harmless.

Other physical evidence suggested that Norwood was in the drug distribution business. The smell of marijuana greeted the officers when they arrived at Norwood's house in response to the domestic disturbance call. Norwood admitted to smoking marijuana, and the police found two bags of marijuana in the house. When the police found him, Norwood was lying on his bed in his home. A loaded 25-caliber handgun was found under his mattress. A tray bearing Norwood's fingerprints was found under the nightstand next to Norwood's side of the bed. On that tray were an electronic scale with traces of cocaine on it, as well as baggies of crack cocaine. Bundles of crack cocaine were also found on Norwood's person when he was searched incident to his arrest.

In sum, we are convinced beyond any reasonable doubt on the basis of all the remaining evidence adduced at trial that the jury would have convicted Norwood on the elements of the possession with intent to distribute offense regardless of the challenged affidavit. *Cf. United States v. Larson*, 495 F.3d 1094, 1108 (9th Cir. 2007) (en banc) (concluding that a Confrontation Clause error was harmless beyond any reasonable doubt where other evidence established defendant's participation in drug conspiracy).

II. Claimed Violation of Norwood's Due Process Rights at Trial and Sentencing

Norwood charges that his due process rights were violated both at trial and at sentencing. First, he

argues that comments made by the prosecution during closing arguments violated his Fifth Amendment right to silence. Second, he argues that the allegedly arbitrary sentencing distinction between crack and powder cocaine violates the Due Process Clause of the Fifth Amendment as well as the Eighth Amendment prohibition against cruel and unusual punishment. We address these arguments in turn.

The Fifth Amendment protects a defendant's right to remain silent by assuring that "silence will carry no penalty," and that the prosecution cannot use a defendant's silence to imply guilt. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). As acknowledged by this court, "[t]he privilege against self-incrimination prevents the government's use at trial of evidence of a defendant's silence — not merely the silence itself, but the circumstances of that silence as well." *Bushyhead*, 270 F.3d at 913.

However, where "the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel," there is no Fifth Amendment violation. *United States v. Robinson*, 485 U.S. 25, 32 (1988). In *Robinson*, the defense counsel argued several times in his closing argument that the government had denied Robinson the opportunity to explain his actions. *Id.* at 27. The prosecutor responded by indicating that Robinson could have explained himself by testifying. The Supreme Court ruled that Robinson's Fifth Amendment Rights were not thereby infringed because this response did not "treat the defendant's silence as substantive evidence of guilt," but rather

answered the defense's claim that Robinson's trial was unfair. *Id.* at 31-32.

Similarly, in this case, the prosecutor merely responded to Norwood's implication of investigative misconduct. Defense counsel implied that there was no evidence that Norwood had used crack cocaine only because the police had failed to test the box of marijuana blunts. The prosecutor's comment was made to defend the police officers' decision not to test the marijuana blunts, not to suggest that Norwood's silence was substantive evidence of his guilt.

We will not reverse a lower court's conviction " 'when a prosecutorial comment is a single, isolated incident, does not stress an inference of guilt from silence as the basis for conviction, and is followed by a curative instruction.' " *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002) (quoting *United States v. Tarazon*, 989 F.2d 1045, 1051 (9th Cir. 1993)); *see also United States v. Foster*, 985 F.2d 466, 468 (9th Cir. 1993) (recognizing that "there is no *Doyle* violation if the district court promptly sustains a timely objection to a question concerning post-arrest silence, and gives a curative jury instruction"). In this case, the prosecution's allegedly violative comment was a single incident in closing argument, and as indicated above, served primarily to refute an implied claim of investigative carelessness. The district court immediately sustained Norwood's objection to the comment and provided a curative instruction. If any error existed on this record, it was harmless. Based on these facts, we affirm Norwood's conviction.

The Fifth Amendment also guarantees a defendant the right to due process at sentencing.

Norwood argues that his sentence, authorized by 21 U.S.C. § 841(b), is cruel and unusual in violation of the Eighth Amendment and based on an arbitrary distinction that violates the Due Process Clause of the Fifth Amendment. *See Chapman v. United States*, 500 U.S. 453, 465 (1991). Norwood acknowledges that we have previously addressed this issue in *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992). However, he raises the issue in this appeal because "[n]o issue in the world of federal sentencing has sparked more controversy or engendered more criticism than the punishment scheme for crack and powder cocaine." Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT. R. 291 291 (2007).

Under our precedents, Norwood must show that there is not even a debatable basis for the distinction between crack and powder cocaine in order to successfully challenge Congress' statutory distinction between these two forms of cocaine base. *Harding*, 971 F.2d at 413 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)). He has failed to do so.

In his brief, Norwood cites a series of Special Reports to Congress provided by the Sentencing Commission for the past thirteen years. Although these reports indicate that some of the alleged differences between crack and powder cocaine cited by Congress in 1986 have been scientifically disproven, the reports still suggest that the two forms have distinctive qualities and that there are reasons for treating the two forms differently. *See* United States Sentencing Commission, 2007 REPORT

TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007).

As Norwood himself seems to acknowledge, in a case such as this it is the role of Congress to alter the relevant statutes, and we remain bound by the statutes currently in effect so long as Congress has a debatable rationale for preserving its rational-basis distinction. Norwood has also failed to provide any persuasive rationale for why his sentence should be considered cruel and unusual under the Eighth Amendment. Accordingly, we affirm Norwood's sentence.

III. Sufficiency of the Evidence

The standard of review for sufficiency of the evidence to support a criminal conviction is well established. The Supreme Court has long advised that a reviewing court is not required to determine

> whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson, 443 U.S. at 319 (internal citation omitted).

To obtain a conviction under § 924(c)(1), the government must show that the defendant's possession of the firearm was "in furtherance" of his drug crime. *United States v. Lopez*, 477 F.3d 1110, 1115 (9th Cir. 2007). As we noted in *Rios*, 449 F.3d at 1013, § 924(c)(1) was amended in 1998 to employ the

provision that the firearm be possessed "in furtherance of" the drug trafficking crime. This amendment superceded the previous standard that the offender "use or carry" a firearm "during and in relation to any . . . drug trafficking crime." 18 U.S.C. § 924(c)(1) (1994), *amended by* 18 U.S.C. § 924(c)(1) (Supp. IV 1998). The amendment sought to broaden the scope of § 924(c)(1) to include more conduct than actually using or carrying the weapon during the course of the drug trafficking offense. H.R. REP. No. 105-344, at 6 (1997). *See also Rios*, 449 F.3d at 1013-14 (detailing the reasons behind the alteration, including Congress's disapproval of *Bailey v. United States*, 516 U.S. 137 (1995) (defining "use" to require active employment of a firearm)).

However, "mere possession of a firearm by an individual convicted of a drug crime is not sufficient for a rational trier of fact to convict" under § 924(c)(1). *Rios*, 449 F.3d at 1012. A conviction is only supported by sufficient evidence when the facts "reveal a nexus between the guns discovered and the underlying offense." *United States v. Krouse*, 370 F.3d 965, 968 (2004). To prove this nexus, the government must "illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity." *Id.* at 967 (quoting H.R. REP. No. 105-334, at 12 (1997)). Expert testimony indicating that drug traffickers "generally use firearms to further their drug crimes" is not sufficient. *Rios*, 449 F.3d at 1014.

In cases where the underlying drug offense is possession with intent to distribute, the government has provided adequate evidence of a nexus between

the firearm and the drug crime by showing that the firearm is in the same room and "within easy reach" of a "substantial quantity of drugs and drug trafficking paraphernalia." *Krouse*, 370 F.3d at 968; *see also Lopez*, 477 F.3d at 1115 ("Because Lopez's drug crime was possession of cocaine with intent to distribute, evidence establishing the ready accessibility of the gun while he was in possession of a distributable amount of cocaine satisfied the 'in furtherance' requirement."). In this case, while the quantity of drugs is smaller and the circumstances establishing a nexus are not as clear as those in *Krouse* or *Lopez*, we cannot say that "[no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

The gun at issue in this case was found by the police only a few feet from evidence that the jury found sufficient to establish Norwood's possession of cocaine with intent to distribute conviction. Specifically, the police found a digital scale, on which drug residue and Norwood's fingerprints were found, and 7.7 grams of cocaine packaged in two "eight ball" sizes, which both parties stipulated is a commercial amount that could be sold on the street. In addition, the police first discovered Norwood lying on top of the mattress where the gun was hidden, with over $2500 dollars in his pocket, along with a smaller amount of cocaine, which witnesses testified could still be considered a commercial amount. Given this evidence, we affirm the district court's ruling that "a reasonable jury could infer that [Norwood] possessed the firearm in furtherance of the trafficking of crack, specifically to protect himself and his business."

Order Den. Mot. For J. of Acquittal, *United States v. Norwood*, No. 06-091, (E.D. Wash. 2007).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-30050
D.C. No. CR-06-00091-LRS
February 17, 2010

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

ROBERT LEWIS NORWOOD, Defendant-Appellant

OPINION

On Remand from The United States Supreme Court

Before:

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Opinion by:

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*The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Appeal from the United States District Court for the Eastern District of Washington

Lonny R. Suko, District Judge, Presiding

AFFIRMED.

ROBERT J. PFISTER AND ANDREW B. BRETTLER, Simpson Thacher & Bartlett LLP, Los Angeles, California, *for the defendant-appellant.*

JAMES A. MCDEVITT AND K. JILL BOLTON, United States Attorney, Spokane, Washington, *for the plaintiff-appellee.*

OPINION

MILAN D. SMITH, JR., *Circuit Judge:*

In this appeal, Defendant-Appellant Robert L. Norwood challenges his jury conviction for possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). Norwood claims violation of his Sixth Amendment right to confront his accuser and violation of his due process rights both in trial and at sentencing. Norwood also claims that the evidence was insufficient to convict him for possession of a firearm in furtherance of a drug trafficking crime.

We affirmed Norwood's conviction and sentence in *United States v. Norwood*, 555 F.3d 1061 (9th Cir. 2009). The matter is again before us on remand from

the United States Supreme Court. The Court vacated our earlier opinion and remanded for reconsideration of Norwood's Confrontation Clause claim in light of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). We again affirm Norwood's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

In April of 2006, police responded to a domestic violence call in Spokane, Washington. Upon entering the home, the police encountered Norwood in the bedroom lying on his bed. They smelled marijuana, and asked Norwood to step outside. In response to police questioning, Norwood admitted he had "just smoked a joint," but denied having any other drugs in the bedroom. The officers then arrested Norwood, and while searching him discovered 0.86 grams of crack cocaine and over $2500 dollars in his pockets.

After obtaining a warrant, the police searched Norwood's home and vehicle. In the car, police found $7000 in cash, separated into $1000 tightly wrapped bundles. In the bedroom, the police discovered two baggies containing a total of 7.7 grams of cocaine base and a digital scale dusted with drug residue underneath the dresser next to the bed. Police also found a wood box containing several "marijuana blunts," or butts of marijuana joints. In the closet, police found 42.4 grams of harvested marijuana in an ice cream box. Between the mattress and the box spring of the bed, police found a 25 caliber semiautomatic handgun. The police did not find any other drug paraphernalia.

On August 2, 2007, Norwood was indicted in federal district court on three counts: (1) being a

felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e); (2) possessing cocaine with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 2; and (3) possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). The government eventually dismissed the first count and proceeded to trial on the second and third counts. Norwood made a Federal Rule of Criminal Procedure 29 motion to dismiss at the close of the government's case, another at the close of the defendant's case, and still a third following trial, each of which was denied.

As part of its case-in-chief, the government presented an affidavit prepared by Jodi Arndt, an employee at the Washington Department of Employment Security, which certified that "a diligent search of the department's files failed to disclose any record of wages reported for [Norwood] from January 1, 2004 through March 31, 2007." Although Arndt did not appear in person to testify, the court admitted her affidavit as circumstantial evidence that Norwood had no legal source for the large amounts of cash that were found on his person and in his car.

During closing argument, Norwood's counsel argued to the jury that the drugs found in Norwood's apartment were for personal use, and suggested that Norwood had been smoking the crack through the marijuana blunts that were found on the scene, but which had not been seized or tested. The prosecutor responded to the defense's comments as follows: "When we talk about those blunts, yeah, it would have been real nice if the police got those. The police

didn't get those, but they admitted that, but you know what, the defendant didn't tell them that he was smoking the marijuana with the crack cocaine." The defense immediately objected and moved for a mistrial on the basis that Norwood's right to silence had been violated. The district court sustained the objection and directed the jury not to consider the prosecution's comment. The court denied the motion for a mistrial.

On October 31, 2007, the jury returned a verdict of guilty on both counts. The district court sentenced Norwood to 120 months in prison for Count 2 and 60 months for Count 3, to run consecutively. Norwood appealed to this court.

STANDARD OF REVIEW

Norwood alleges that his Sixth Amendment right to confront his accusers was violated when the district court admitted into evidence a written affidavit without requiring the affiant to testify on the stand. We review admission of a declarant's out-of-court statements de novo to test for possible violations of the Confrontation Clause. *Lilly v. Virginia*, 527 U.S. 116, 137 (1999). If a constitutional violation has occurred, we then review for harmless error. *Chapman v. California*, 386 U.S. 18, 21-22 (1967).

Norwood also alleges that the prosecution's reference to the fact that he had not spoken with police officers regarding possible use of cocaine in the marijuana blunts violated his due process rights. We review a claim that the prosecution's comment has violated the defendant's right to silence de novo. *United States v. Bushyhead*, 270 F.3d 905, 911 (9th

Cir. 2001). If the prosecution's comment is determined to be improper, we then apply harmless error review. *Id.*

Finally, Norwood argues that the evidence was insufficient to convict him on the count of possession of a firearm in furtherance of a drug trafficking crime. When the defendant has moved for a judgment of acquittal after the close of evidence, this court reviews denial of the motion de novo. *United States v. Rios*, 449 F.3d 1009, 1011 (9th Cir. 2006). We will not overrule a conviction if "'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

DISCUSSION

I. Claimed Violation of Norwood's Sixth Amendment Rights

The Sixth Amendment of the U.S. Constitution guarantees an accused the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Supreme Court has interpreted this right to apply to out-of-court statements as well as in-court testimony. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). As the Court summarized in *Crawford*, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59.

The Supreme Court has yet to define the full extent to which rights under the Confrontation Clause are applicable to testimonial and

nontestimonial statements. However, in *Melendez-Diaz*, the Court provided additional guidance, concluding that "certificates of analysis" verifying the identity of a contraband chemical substance are testimonial under *Crawford*. 129 S. Ct. at 2531, 2532. Quoting *Crawford*, the Court explained that the "certificates of analysis" (which are "quite plainly affidavits") are "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact" and "functionally identical to live, in-court testimony." *Id.* (internal quotation marks omitted). Accordingly, *Melendez-Diaz* held that such affidavits are inadmissible unless the affiant testifies at trial, or is unavailable at trial but had earlier been available for cross-examination. *Id.*

In this case, the government concedes that under *Melendez-Diaz*, Washington Department of Employment Security Assistant Records Officer Jodi Arndt's affidavit, prepared for use at Norwood's trial to prove the absence of any record of Norwood having legitimate employment, should not have been admitted without Arndt presenting herself at trial for examination.

In light of the government's concession that admission of Arndt's affidavit violated Norwood's Sixth Amendment rights, we must remand for a new trial unless the government demonstrates beyond a reasonable doubt that admission of the evidence was harmless. *Chapman*, 386 U.S. at 24.

> Whether such an error is harmless in a particular case depends upon a host of factors . . . includ[ing]the importance of the witness' testimony in the prosecution's

> case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Under the circumstances of this case, the government has met its burden. Unlike the affidavit in *Melendez-Diaz*, the affidavit in this case was not offered to prove an element of the offense, nor was it the *sole* evidence of any relevant fact. Rather, the testimony provided by the disputed affidavit was not particularly important to the case, and was cumulative.

Specifically, the affidavit was offered to prove the lack of any record that Norwood had legitimate employment that might explain his possession of $7,000 in cash stored in separate rolls of $1,000, bundled in duct tape, in the center console of his vehicle, and another $2,531 in cash on his person.

The amount of cash and Norwood's method of storing it strongly suggest that the money did not derive from a legitimate source. Further, the jury heard evidence from Norwood's girlfriend that he rarely left the house during the day, did not receive paychecks from any regular employment, and that his only job involved occasional cleaning of rental units. Thus, Norwood's girlfriend's testimony established the same fact as the disputed affidavit—that Norwood did not have any sort of job that would have led to employment records with the state—

making the affidavit merely cumulative. Thus, although the government relied on the affidavit in arguing to the jury that the cash could not have derived from a legitimate source, the government could have made precisely the same argument based on the testimony of Norwood's girlfriend. Accordingly, the district court's admission of the affidavit, and the government's reliance on it, were harmless.

Other physical evidence suggested that Norwood was in the drug distribution business. The smell of marijuana greeted the officers when they arrived at Norwood's house in response to the domestic disturbance call. Norwood admitted to smoking marijuana, and the police found two bags of marijuana in the house. When the police found him, Norwood was lying on his bed in his home. A loaded 25-caliber handgun was found under his mattress. A tray bearing Norwood's fingerprints was found under the nightstand next to Norwood's side of the bed. On that tray were an electronic scale with traces of cocaine on it, as well as baggies of crack cocaine. Bundles of crack cocaine were also found on Norwood's person when he was searched incident to his arrest.

In sum, disregarding the affidavit entirely, the evidence against Norwood on the elements of the offense of possession of cocaine base with intent to distribute was sufficient to establish his guilt beyond any reasonable doubt. *Cf. United States v. Larson*, 495 F.3d 1094, 1108 (9th Cir. 2007) (en banc) (concluding that a Confrontation Clause error was harmless beyond any reasonable doubt where other

evidence established defendant's participation in drug conspiracy).

II. Claimed Violation of Norwood's Due Process Rights at Trial and Sentencing

Norwood charges that his due process rights were violated both at trial and at sentencing. First, he argues that comments made by the prosecution during closing arguments violated his Fifth Amendment right to silence. Second, he argues that the allegedly arbitrary sentencing distinction between crack and powder cocaine violates the Due Process Clause of the Fifth Amendment as well as the Eighth Amendment prohibition against cruel and unusual punishment. We address these arguments in turn.

The Fifth Amendment protects a defendant's right to remain silent by assuring that "silence will carry no penalty," and that the prosecution cannot use a defendant's silence to imply guilt. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). As acknowledged by this court, "[t]he privilege against self-incrimination prevents the government's use at trial of evidence of a defendant's silence — not merely the silence itself, but the circumstances of that silence as well." *Bushyhead*, 270 F.3d at 913.

However, where "the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel," there is no Fifth Amendment violation. *United States v. Robinson*, 485 U.S. 25, 32 (1988). In *Robinson*, the defense counsel argued several times in his closing argument that the government had denied Robinson the opportunity to explain his actions. *Id.* at 27. The

prosecutor responded by indicating that Robinson could have explained himself by testifying. The Supreme Court ruled that Robinson's Fifth Amendment Rights were not thereby infringed because this response did not "treat the defendant's silence as substantive evidence of guilt," but rather answered the defense's claim that Robinson's trial was unfair. *Id.* at 31- 32.

Similarly, in this case, the prosecutor merely responded to Norwood's implication of investigative misconduct. Defense counsel implied that there was no evidence that Norwood had used crack cocaine only because the police had failed to test the box of marijuana blunts. The prosecutor's comment was made to defend the police officers' decision not to test the marijuana blunts, not to suggest that Norwood's silence was substantive evidence of his guilt.

We will not reverse a lower court's conviction " 'when a prosecutorial comment is a single, isolated incident, does not stress an inference of guilt from silence as the basis for conviction, and is followed by a curative instruction.' " *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002) (quoting *United States v. Tarazon*, 989 F.2d 1045, 1051 (9th Cir. 1993)); *see also United States v. Foster*, 985 F.2d 466, 468 (9th Cir. 1993) (recognizing that "there is no *Doyle* violation if the district court promptly sustains a timely objection to a question concerning post-arrest silence, and gives a curative jury instruction"). In this case, the prosecution's allegedly violative comment was a single incident in closing argument, and as indicated above, served primarily to refute an implied claim of investigative carelessness. The district court immediately sustained Norwood's

objection to the comment and provided a curative instruction. If any error existed on this record, it was harmless. Based on these facts, we affirm Norwood's conviction.

The Fifth Amendment also guarantees a defendant the right to due process at sentencing. Norwood argues that his sentence, authorized by 21 U.S.C. § 841(b), is cruel and unusual in violation of the Eighth Amendment and based on an arbitrary distinction that violates the Due Process Clause of the Fifth Amendment. *See Chapman v. United States*, 500 U.S. 453, 465 (1991). Norwood acknowledges that we have previously addressed this issue in *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992). However, he raises the issue in this appeal because "[n]o issue in the world of federal sentencing has sparked more controversy or engendered more criticism than the punishment scheme for crack and powder cocaine." Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT. R. 291 291 (2007).

Under our precedents, Norwood must show that there is not even a debatable basis for the distinction between crack and powder cocaine in order to successfully challenge Congress' statutory distinction between these two forms of cocaine base. *Harding*, 971 F.2d at 413 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)). He has failed to do so.

In his brief, Norwood cites a series of Special Reports to Congress provided by the Sentencing Commission for the past thirteen years. Although these reports indicate that some of the alleged

differences between crack and powder cocaine cited by Congress in 1986 have been scientifically disproven, the reports still suggest that the two forms have distinctive qualities and that there are reasons for treating the two forms differently. *See* United States Sentencing Commission, 2007 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007).

As Norwood himself seems to acknowledge, in a case such as this it is the role of Congress to alter the relevant statutes, and we remain bound by the statutes currently in effect so long as Congress has a debatable rationale for preserving its rational-basis distinction. Norwood has also failed to provide any persuasive rationale for why his sentence should be considered cruel and unusual under the Eighth Amendment. Accordingly, we affirm Norwood's sentence.

III. Sufficiency of the Evidence

The standard of review for sufficiency of the evidence to support a criminal conviction is well established. The Supreme Court has long advised that a reviewing court is not required to determine

> whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson, 443 U.S. at 319 (internal citation omitted).

To obtain a conviction under § 924(c)(1), the government must show that the defendant's possession of the firearm was "in furtherance" of his drug crime. *United States v. Lopez*, 477 F.3d 1110, 1115 (9th Cir. 2007). As we noted in *Rios*, 449 F.3d at 1013, § 924(c)(1) was amended in 1998 to employ the provision that the firearm be possessed "in furtherance of" the drug trafficking crime. This amendment superceded the previous standard that the offender "use or carry" a firearm "during and in relation to any . . . drug trafficking crime." 18 U.S.C. § 924(c)(1) (1994), *amended by* 18 U.S.C. § 924(c)(1) (Supp. IV 1998). The amendment sought to broaden the scope of § 924(c)(1) to include more conduct than actually using or carrying the weapon during the course of the drug trafficking offense. H.R. REP. No. 105-344, at 6 (1997). *See also Rios*, 449 F.3d at 1013-14 (detailing the reasons behind the alteration, including Congress's disapproval of *Bailey v. United States*, 516 U.S. 137 (1995) (defining "use" to require active employment of a firearm)).

However, "mere possession of a firearm by an individual convicted of a drug crime is not sufficient for a rational trier of fact to convict" under § 924(c)(1). *Rios*, 449 F.3d at 1012. A conviction is only supported by sufficient evidence when the facts "reveal a nexus between the guns discovered and the underlying offense." *United States v. Krouse*, 370 F.3d 965, 968 (2004). To prove this nexus, the government must "illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity." *Id.* at 967 (quoting H.R. REP. No. 105-334, at 12 (1997)). Expert testimony indicating that drug traffickers "generally use firearms to

further their drug crimes" is not sufficient. *Rios*, 449 F.3d at 1014.

In cases where the underlying drug offense is possession with intent to distribute, the government has provided adequate evidence of a nexus between the firearm and the drug crime by showing that the firearm is in the same room and "within easy reach" of a "substantial quantity of drugs and drug trafficking paraphernalia." *Krouse*, 370 F.3d at 968; *see also Lopez*, 477 F.3d at 1115 ("Because Lopez's drug crime was possession of cocaine with intent to distribute, evidence establishing the ready accessibility of the gun while he was in possession of a distributable amount of cocaine satisfied the 'in furtherance' requirement."). In this case, while the quantity of drugs is smaller and the circumstances establishing a nexus are not as clear as those in *Krouse* or *Lopez*, we cannot say that "[no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

The gun at issue in this case was found by the police only a few feet from evidence that the jury found sufficient to establish Norwood's possession of cocaine with intent to distribute conviction. Specifically, the police found a digital scale, on which drug residue and Norwood's fingerprints were found, and 7.7 grams of cocaine packaged in two "eight ball" sizes, which both parties stipulated is a commercial amount that could be sold on the street. In addition, the police first discovered Norwood lying on top of the mattress where the gun was hidden, with over $2500 dollars in his pocket, along with a smaller amount of cocaine, which witnesses testified could

still be considered a commercial amount. Given this evidence, we affirm the district court's ruling that "a reasonable jury could infer that [Norwood] possessed the firearm in furtherance of the trafficking of crack, specifically to protect himself and his business." Order Den. Mot. For J. of Acquittal, *United States v. Norwood,* No. 06-091, (E.D. Wash. 2007).

AFFIRMED.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 4, 2009

Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

Re: Robert Lewis Norwood
v. United States
No. 09-69 (Your docket No. 08-30050)

Dear Clerk:

Attached please find a certified copy of the judgment of this Court in the above-entitled case. You may obtain a copy of the opinion cited in the judgment by visiting our website @www.supremecourtus.gov.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Elizabeth Brown
Elizabeth Brown
Judgments/Mandates Clerk

Enc.
cc: Robert J. Pfister, Esq.
Solicitor General

Supreme Court of the United States

No. 09-69

ROBERT LEWIS NORWOOD,

Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for writ of *certiorari* and response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of *certiorari* is granted. The judgment of the above court is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. __ (2009).

November 2, 2009

[Seal of the Supreme Court of the United States]
A True copy WILLIAM K. SUTER
Test
Clerk of the Supreme Court of the United States
By: /s/ Cynthia Rapp

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-30050
D.C. No. CR-06-00091-LRS
February 18, 2009

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

ROBERT LEWIS NORWOOD, Defendant-Appellant

Before:

THOMAS M. REAVLEY*, SENIOR CIRCUIT JUDGE, AND RICHARD C. TALLMAN AND MILAN D. SMITH, JR., CIRCUIT JUDGES.

Opinion by:

JUDGE MILAN D. SMITH, JR.

*The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Appeal from the United States District Court
for the Eastern District of Washington

Lonny R. Suko, District Judge, Presiding

AFFIRMED.

TRACY A. STAAB AND CHRISTINA HUNG, Federal Defenders of Eastern Washington & Idaho, Spokane, Washington, *for the defendant-appellant.*

JAMES A. MCDEVITT AND K. JILL BOLTON, United States Attorney, Spokane, Washington, *for the plaintiff-appellee.*

Milan D. Smith, Jr., *Circuit Judge*:

Defendant-Appellant Robert L. Norwood appeals his jury conviction of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). On appeal, Norwood claims violation of his Sixth Amendment right to confront his accuser and violation of his due process rights both in trial and at sentencing. Norwood also claims that the evidence was insufficient to convict him for possession of a firearm in furtherance of a drug trafficking crime. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and we affirm Norwood's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

In April of 2006, police responded to a domestic violence call in Spokane, Washington. Upon entering the home, the police encountered Norwood in the bedroom lying on his bed. They smelled marijuana, and asked Norwood to step outside. In response to police questioning, Norwood admitted he had "just smoked a joint," but denied having any other drugs in the bedroom. The officers then arrested Norwood, and while searching him discovered 0.86 grams of crack cocaine and over $2500 dollars in his pockets.

After obtaining a warrant, the police searched Norwood's home and vehicle. In the car, police found $7000 in cash, separated into $1000 tightly wrapped bundles. In the bedroom, the police discovered two baggies containing a total of 7.7 grams of cocaine base and a digital scale dusted with drug residue underneath the dresser next to the bed. Police also found a wood box containing several "marijuana blunts," or butts of marijuana joints. In the closet, police found 42.4 grams of harvested marijuana in an ice cream box. Between the mattress and the box spring of the bed, police found a 25 caliber semiautomatic handgun. The police did not find any other drug paraphernalia.

On August 2, 2007, Norwood was indicted in federal district court on three counts: (1) being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e); (2) possessing cocaine with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 2; and (3) possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). The government eventually dismissed the first count

and proceeded to trial on the second and third counts. Norwood made a Federal Rule of Criminal Procedure 29 motion to dismiss at the close of the government's case, another at the close of the defendant's case, and still a third following trial, each of which was denied.

As part of its case-in-chief, the government presented an affidavit prepared by Jodi Arndt, an employee at the Washington Department of Employment Security, which certified that "a diligent search of the department's files failed to disclose any record of wages reported for [Norwood] from January 1, 2004 through March 31, 2007." Although Arndt did not appear in person to testify, the court admitted her affidavit as circumstantial evidence that Norwood had no legal source for the large amounts of cash that were found on his person and in his car.

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prosecution's comment. The court denied the motion for a mistrial.

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STANDARD OF REVIEW

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Norwood also alleges that the prosecution's reference to the fact that he had not spoken with police officers regarding possible use of cocaine in the marijuana blunts violated his due process rights. We review a claim that the prosecution's comment has violated the defendant's right to silence de novo. *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001). If the prosecution's comment is determined to be improper, we then apply harmless error review. *Id.*

Finally, Norwood argues that the evidence was insufficient to convict him on the count of possession of a firearm in furtherance of a drug trafficking crime. When the defendant has moved for a judgment of acquittal after the close of evidence, this court reviews denial of the motion de novo. *United States v. Rios*, 449 F.3d 1009, 1011 (9th Cir. 2006).

We will not overrule a conviction if " 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

DISCUSSION

A. Claimed Violation of the Norwood's Sixth Amendment Rights

The Sixth Amendment of the U.S. Constitution guarantees an accused the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Supreme Court has interpreted this right to apply to out-of-court statements as well as in-court testimony. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). As the Court in *Crawford* summarized, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59.

The Supreme Court has yet to define the extent to which rights under the Confrontation Clause are applied to testimonial and nontestimonial statements. The opinion in *Crawford* traces the history of the Sixth Amendment and identifies "[s]tatements taken by police officers in the course of interrogations" as testimonial. *Id.* at 51-52. However, the *Crawford* Court declined to take up the issue of nontestimonial statements, indicating only that "it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay laws . . . as would an approach that exempted such

[nontestimonial] statements from Confrontation Clause scrutiny altogether." *Id.* at 68. The Court then declined the opportunity "to spell out a comprehensive definition of 'testimonial,' "noting only that the term would apply "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

This Circuit has interpreted the Supreme Court's ruling in *Crawford* to allow the admission of nontestimonial statements without scrutiny under the Confrontation Clause. *United States v. Cervantes-Flores*, 421 F.3d 825, 831 (9th Cir. 2005). Our opinion in *Cervantes-Flores* also concluded that a certificate of nonexistence of a record (CNR), which contained language virtually identical to the affidavit at issue here, is nontestimonial in nature because it is similar to a business record. *Id.* at 832 (citing *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005) for the same conclusion). As we explained,

> [b]y issuing the CNR, [the affiant] certified that a record that the INS would keep in the course of its regularly conducted activities did not exist in the agency's files. She certified this fact in the same manner that she would certify that such a record *did* exist in those files and that it was an official record of the INS.

Id. Although we recognized that the CNR in *Cervantes-Flores* was prepared for litigation, which is "one of the circumstances that *Crawford* emphasizes as a concern of the Sixth Amendment," it addressed a class of documents that were not

prepared for litigation, and were better classified as business records. *Id.* at 832-33. The CNR served merely to inform the court that no public record kept in the ordinary course of business could be found.

Cervantes-Flores controls this case. The affiant here prepared a CNR indicating that there was no record that Norwood had received taxable wages for the period in question. Such a record would have been among the business records of the Washington State Employment Security Department kept in the ordinary course of business, if Norwood had been legally employed in Washington during that time. Under the reasoning of *Cervantes-Flores*, the CNR in this case is not testimonial and is admissible under the Sixth Amendment.

Norwood urges this court to reconsider *Cervantes-Flores* in light of the Supreme Court's holding in *Davis v. Washington*, 547 U.S. 813 (2006). Norwood argues that *Davis* stands for the proposition that "a certificate, created by a government employee for the sole purpose of establishing a fact at trial, is clearly testimonial." However, *Davis* involved statements garnered by police interrogation of domestic violence victims who then failed to appear in court. According to *Davis*:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose

> of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Thus, the *Davis* Court limited its holding to factual situations involving police interrogation, and its holding does not undermine this court's ruling in *Cervantes-Flores*. Accordingly, we affirm the district court's decision to admit Arndt's affidavit.

B. Claimed Violation of Norwood's Due Process Rights at Trial and Sentencing

Norwood charges that his due process rights were violated both at trial and at sentencing. First, he argues that comments made by the prosecution during closing arguments violated his Fifth Amendment right to silence. Second, he argues that the allegedly arbitrary sentencing distinction between crack and powder cocaine violates the Due Process Clause of the Fifth Amendment as well as the Eighth Amendment prohibition against cruel and unusual punishment. We address these arguments in turn.

The Fifth Amendment protects a defendant's right to remain silent by assuring that "silence will carry no penalty," and that the prosecution cannot use a defendant's silence to imply guilt. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). As acknowledged by this court, "[t]he privilege against self-incrimination prevents the government's use at trial of evidence of a defendant's silence — not merely the silence itself, but the circumstances of that silence as well." *Bushyhead*, 270 F.3d at 913.

However, where "the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel," there is no Fifth Amendment violation. *United States v. Robinson*, 485 U.S. 25, 32 (1988). In *Robinson*, the defense counsel argued several times in his closing argument that the government had denied Robinson the opportunity to explain his actions. *Id.* at 27. The prosecutor responded by indicating that Robinson could have explained himself by testifying. The Supreme Court ruled that Robinson's Fifth Amendment Rights were not thereby infringed because this response did not "treat the defendant's silence as substantive evidence of guilt," but rather answered the defense's claim that Robinson's trial was unfair. *Id.* at 31-32.

Similarly, in this case, the prosecutor merely responded to Norwood's implication of investigative misconduct. Defense counsel implied that there was no evidence that Norwood had used crack cocaine only because the police had failed to test the box of marijuana blunts. The prosecutor's comment was made to defend the police officers' decision not to test the marijuana blunts, not to suggest that Norwood's silence was substantive evidence of his guilt.

We will not reverse a lower court's conviction " 'when a prosecutorial comment is a single, isolated incident, does not stress an inference of guilt from silence as the basis for conviction, and is followed by a curative instruction.' " *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002) (quoting *United States v. Tarazon*, 989 F.2d 1045, 1051 (9th Cir. 1993)); *see also United States v. Foster*, 985 F.2d 466, 468 (9th Cir. 1993) (ruling that "there is no

Doyle violation if the district court promptly sustains a timely objection to a question concerning post-arrest silence, and gives a curative jury instruction"). In this case, the prosecution's allegedly violative comment was a single incident in closing argument, and as indicated above, served primarily to refute an implied claim of investigative carelessness. The district court immediately sustained Norwood's objection to the comment and provided a curative instruction. If any error existed on this record, it was harmless. Based on these facts, we affirm Norwood's conviction.

The Fifth Amendment also guarantees a defendant the right to due process at sentencing. Norwood argues that his sentence, authorized by 21 U.S.C. § 841(b), is cruel and unusual in violation of the Eighth Amendment and based on an arbitrary distinction that violates the Due Process Clause of the Fifth Amendment. *See Chapman v. United States*, 500 U.S. 453, 465 (1991). Norwood acknowledges that we have previously addressed this issue in *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992). However, he raises the issue in this appeal because "[n]o issue in the world of federal sentencing has sparked more controversy or engendered more criticism than the punishment scheme for crack and powder cocaine." Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT. R. 291, 291 (2007).

Under this court's precedent, Norwood must show that there is not even a debatable basis for the distinction between crack and powder cocaine in order to successfully challenge Congress' statutory

distinction between these two forms of cocaine base. *Harding*, 971 F.2d at 413 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)). He has failed to do so.

In his brief, Norwood cites a series of Special Reports to Congress provided by the Sentencing Commission for the past thirteen years. Although these reports indicate that some of the alleged differences between crack and powder cocaine cited by Congress in 1986 have been scientifically disproven, the reports still suggest that the two forms have distinctive qualities and that there are reasons for treating the two forms differently. *See* United States Sentencing Commission, 2007 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007).

As Norwood himself seems to acknowledge, in a case such as this it is the role of Congress to alter the relevant statutes, and we remain bound by the statutes currently in effect so long as Congress has a debatable rationale for preserving its rational-basis distinction. Norwood has also failed to provide any persuasive rationale for why his sentence should be considered cruel and unusual under the Eighth Amendment. Accordingly, we affirm Norwood's sentence.

C. Sufficiency of the Evidence

The standard of review for sufficiency of the evidence to support a criminal conviction is well established. The Supreme Court has long advised that a reviewing court is not required to determine

> whether *it* believes that the evidence at trial established guilt beyond a reasonable

> doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson, 443 U.S. at 319 (internal citation omitted).

To obtain a conviction under § 924(c)(1), the government must show that the defendant's possession of the firearm was "in furtherance" of his drug crime. *United States v. Lopez*, 477 F.3d 1110, 1115 (9th Cir. 2007). As we noted in *Rios*, 449 F.3d at 1013, § 924(c)(1) was amended in 1998 to employ the provision that the firearm be possessed "in furtherance of" the drug trafficking crime. This amendment superceded the previous standard that the offender "use or carry" a firearm "during and in relation to any . . . drug trafficking crime." 18 U.S.C. § 924(c)(1) (1994), *amended by* 18 U.S.C. § 924(c)(1) (Supp. IV 1998). The amendment sought to broaden the scope of § 924(c)(1) to include more conduct than actually using or carrying the weapon during the course of the drug trafficking offense. H.R. REP. NO. 105-344, at 6 (1997). *See also Rios*, 449 F.3d at 1013-14 (detailing the reasons behind the alteration, including Congress's disapproval of *Bailey v. United States*, 516 U.S. 137 (1995) (defining "use" to require active employment of a firearm)).

However, "mere possession of a firearm by an individual convicted of a drug crime is not sufficient for a rational trier of fact to convict" under § 924(c)(1). *Rios*, 449 F.3d at 1012. A conviction is only supported by sufficient evidence when the facts "reveal a nexus between the guns discovered and the

underlying offense." *United States v. Krouse*, 370 F.3d 965, 968 (2004). To prove this nexus, the government must "illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity." *Id.* at 967 (quoting H.R. REP. NO. 105-334, at 12 (1997)). Expert testimony indicating that drug traffickers "generally use firearms to further their drug crimes" is not sufficient. *Rios*, 449 F.3d at 1014. In cases where the underlying drug offense is possession with intent to distribute, the government has provided adequate evidence of a nexus between the firearm and the drug crime by showing that the firearm is in the same room and "within easy reach" of a "substantial quantity of drugs and drug trafficking paraphernalia." *Krouse*, 370 F.3d at 968; *see also Lopez*, 477 F.3d at 1115 ("Because Lopez's drug crime was possession of cocaine with intent to distribute, evidence establishing the ready accessibility of the gun while he was in possession of a distributable amount of cocaine satisfied the 'in furtherance' requirement."). In this case, while the quantity of drugs is smaller and the circumstances establishing a nexus are not as clear as those in *Krouse* or *Lopez*, we cannot say that "[no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

The gun at issue in this case was found by the police only a few feet from evidence that the jury found sufficient to establish Norwood's possession of cocaine with intent to distribute conviction. Specifically, the police found a digital scale, on which drug residue and Norwood's fingerprints were found, and 7.7 grams of cocaine packaged in two "eight ball"

sizes, which both parties stipulated is a commercial amount that could be sold on the street. In addition, the police first discovered Norwood lying on top of the mattress where the gun was hidden, with over $2500 dollars in his pocket, along with a smaller amount of cocaine, which witnesses testified could still be considered a commercial amount. Given this evidence, we affirm the district court's ruling that "a reasonable jury could infer that [Norwood] possessed the firearm in furtherance of the trafficking of crack, specifically to protect himself and his business." Order Den. Mot. For J. of Acquittal, *United States v. Norwood*, No. 06-091, (E.D. Wash. 2007).

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. CR-06-00091-LRS
December 28, 2007

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

ROBERT LEWIS NORWOOD, Defendant-Appellant

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL

1. BACKGROUND

Jury trial was conducted in this matter on October 29-31, 2007. On October 31, the jury returned guilty verdicts against the Defendant on Count 2 of the Superseding Indictment, Possession With Intent To Distribute 5 Grams Or More Of Cocaine Base, in violation of 21 U.S.C. §841(a)(1), and Count 3, Possession Of Firearm In Furtherance Of The Drug Trafficking Crime Of Possession With Intent To Distribute Cocaine Base. With regard to Count 2, the jury specifically found the cocaine base was "crack" or "rock" cocaine. With regard to Count 3, the jury specifically found the firearm had been possessed in furtherance of the trafficking of cocaine base.

At the conclusion of trial, Defendant made an oral motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29. The court reserved ruling on the motion and directed that briefing be filed by the parties. Said briefing has been filed and the court has considered the same.

2. DISCUSSION

A motion for acquittal must be granted when the evidence, viewed in the light more favorable to the government, is such that a reasonable juror must have a reasonable doubt as to the existence of any essential element of the crime charged. Conversely, if a reasonable juror would not have a reasonable doubt as to the existence of any essential element of the crime charged, the court should not disturb the finding of guilt. *United States v. Yoshida*, 303 F.3d 1145, 1149 (9th Cir. 2002).

With regard to Count 2, Possession With Intent To Distribute 5 Grams Or More Of Cocaine Base, Defendant contends there was insufficient evidence to establish that he distributed cocaine base. With regard to Count 3, Possession Of Firearm In Furtherance Of The Drug Trafficking Crime Of Possession With Intent To Distribute Cocaine Base, Defendant contends that even if the evidence established that a drug trafficking crime occurred, it did not establish that Defendant possessed a firearm or that he possessed it in furtherance of a drug trafficking crime.

Defendant does not dispute that during a search of his person, residence and vehicle, the following was found: 1) approximately $2,500 in cash on his person; 2) approximately $7,000 cash in his vehicle;

3) .86 grams of cocaine base (crack) in his pants pocket; 4) 7.7 grams of crack found on the floor, packaged in 1/8 ounce packages, near a small digital scale, beside the bed he was lying upon; 5) a .22 caliber pistol found beneath the mattress in the bedroom the Defendant was occupying. Though not seized by officers, several marijuana "blunts" were also found and testimony at trial suggested that Defendant was a user of that substance.

Between the .86 grams found on his person and the 7.7 grams found in his residence, there was more than sufficient evidence to establish that Defendant had a distributable amount of cocaine base and that he intended to distribute the same. "Where there is 'other evidence of a plan or intent to distribute,' . . . possession of as little as four or five grams may establish an intent to distribute cocaine." *United States v. Lopez*, 477 F.3d 1110, 1114 (9th Cir. 2007), citing *United States v. Ramirez*, 608 F.3d 1261, 1264 (9th Cir. 1979). Here, there was sufficient "other evidence of a plan or intent to distribute," namely: 1) the large amount of cash found on Defendant's person and in his vehicle; 2) although he had apparently cashed in a modest retirement account from prior employment a number of months previous to his arrest, the Defendant was unemployed and had not been employed since 2001; 3) the cash found in the vehicle was wrapped in seven separate $1,000 bindles/rolls, held together by rubber bands and there was testimony by DEA Task Officer Rick Taylor that drug trafficking is a cash business and that sales of drugs are usually for set amounts based on the relationship between the dealer and the purchaser; and 4) the proximity of the digital scale to the drugs located in the residence and testimony that

latent prints recovered from a metal plate on which the digital scale was found matched the known prints of the Defendant. There was sufficient evidence from which a reasonable jury could infer that Defendant intended to distribute cocaine base. The fact there was no direct evidence that anyone ever purchased drugs from the Defendant or saw him sell drugs is inconsequential.

While the government need not show actual use of a firearm to advance a drug trafficking offence, mere possession of a firearm is not enough. In addition to possession, the government must demonstrate a nexus between the firearm and the underlying offense. A sufficient nexus exists if the firearm was "readily accessible" during the commission of the drug trafficking offense. *Lopez*, 477 F. 3d at 1115. The Ninth Circuit has rejected a "checklist" approach to determining whether a firearm was possessed "in furtherance" of a drug trafficking offense and instead requires consideration of the "totality of the circumstances based on the evidence submitted at trial." *U.S. v. Mosley*, 465 F.3d 412, 416-17 (9th Cir. 2006).

Here, the firearm was found under the mattress of a bed on which the Defendant had been lying. The firearm was easily accessible within the Defendant's reach and therefore, "readily accessible" to him. On the floor beside the bed were 7.7 grams of crack, packaged in 1/8 ounce packages. Near the drugs was a digital scale. On his person, the Defendant had crack (.86 grams in two separate bindles in his pants pocket) and a large amount of cash ($2,500). Evidence was presented that the firearm was loaded and operable. From the totality of these

circumstances, a reasonable jury could infer that Defendant possessed the firearm in furtherance of the trafficking of crack, specifically to protect himself and his business.

3. CONCLUSION

Viewing the evidence presented at trial in the light most favorable to the government, this court concludes that a rational trier of fact would have found beyond a reasonable doubt the existence of each of the essential elements of the crimes of which the Defendant was convicted. Accordingly, Defendant's motion for judgment of acquittal is **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and provide copies to council.

DATED this 28th day of December, 2007.

/s/ Lonny R. Suko
LONNY R. SUKO
United States District Judge

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT LEWIS NORWOOD,
Defendant.

Case No. CR 06-091-LRS-1
Date: October 29th–31st, 2007
Spokane, Washington

Transcript of Jury Trial Proceedings

BEFORE THE HONORABLE LONNY R. SUKO

Appearances:

For the Plaintiff: Ms. Katherine Bolton
Assistant US Attorney
PO Box 1494
Spokane, Washington 99210

For the Defendant: Ms. Christina Hunt
Federal Public Defender
North Post
Suite 700
Spokane, Washington 99210

* * *

[29]

Prosecution/Opening Statement

* * *

They found on that bed right under where the defendant had been laying between the mattress and the box springs a 25 caliber pistol.

And then within just a few inches, maybe a foot or two or maybe three feet, but right next to the bed under the nightstand a metal plate, a small metal plate.

On top of the metal plate was a digital scale and -- or next to the digital scale on top of the metal plate was more crack cocaine, 7 point 7 grams is what DEA forensic laboratory testing will demonstrate.

So in combination, we have got the crack cocaine in his pocket, we have got the crack cocaine next to his bed next the to the firearm and then a search of the defendant's car outside.

I talked about the circumstances. One of the bits of evidence you will hear about in this case is that for all of us who work legitimate jobs, our employers report our income to what is called the Department of Employment Security.

So they tell the State of Washington, okay, this person is employed, here is how much they made this year. Those records for the defendant showed that he hadn't had a job, no legitimate reported income, since 2004.

* * *

[226]

Richard Taylor/Direct Examination

* * *

Q. And what is a user quantity? Give us a real life example of what that is going to look like?

A. Well, as I said, users that -- I was talking to individual users would go and give them 20 dollars and get a couple of rocks. They would go use those, a rock or two over a period of time. A rock is very small in proportion. It is not like a big throwing rock, it is really a small chunk. It is almost -- I don't even know how to describe it without drawing it. It is just like a speck.

Q. Okay. So are you familiar with like sugar packets that

[227]

you get in a restaurant?

A. The Splenda?

Q. Would it be that much?

A. No, it would be less than that.

Q. So how much less than that?

A. I believe the Splenda packets are a couple of grams. I can't remember the actual weight of what that is. It would be like an eighth of a gram if you want to call it that for a rock. I mean, really again it depends, because they are manufacturing crack cocaine from powder cocaine so it depends on how the dealer breaks it into the smaller rocks. They break it down once it is manufactured into, for better sense, a

cookie type form where it is hard and then it is broken into the smaller rocks. So they are not uniform by any means. The only uniform would be what the distributor makes then.

Q. And you explained in 2006, an ounce is about six to eight hundred dollars on the street based on what you knew in Spokane, Washington at that time?

A. Correct.

Q. No taxes or cents involved typically in those traits; are we dealing in whole dollar amounts?

* * *

[240]

Richard Taylor/Cross-Examination

* * *

Q. Okay. And 7 point 7 grams, do you know what that is in terms of what an ounce is?

A. Doing the math -- I mean, that is going to be -- of an ounce, you are at seven grams, 28, so you are going to be about a quarter.

Q. About a quarter of an ounce?

A. Roughly, yes.

Q. Do you know what an eight ball is?

A. It is an eighth.

Q. An eighth of an ounce?

A. Correct.

Q. And is an eight ball something that drugs are commonly sold as?

A. Yes, they sell them in eight ball quantities, yes.

* * *

[242]

Richard Taylor/Cross-Examination

* * *

Q. Okay. Hold on just a moment. Agent Taylor, the consumption of these items, marijuana is sometimes rolled into cigarettes or cigar sized joints, correct?

A. Most of them I see the cigarettes, I haven't seen the cigar one, but --

Q. Okay. And is it true that some people lace the marijuana with things before they smoke it?

A. I have never -- are you talking a cigarette themselves or the marijuana prior to putting in?

Q. No, when they roll it?

A. Yeah, a lot of times they will dip those into like an LSD.

Q. Okay. Have you ever heard of a primo?

A. I have heard the slang, but I am not -- I have heard of many things. It depends on what they are referring to it and I don't know exactly what they would be referring to.

Q. And have you ever heard of marijuana laced with crack cocaine being called a primo?

A. I have heard of it laced, I am not -- the term primo, I would have to ask around about that, I haven't specifically heard primo.

* * *

[283]

Rebecca Holiday/Direct Examination

* * *

Q. Now, you said that Robert smoked marijuana. Do you know whether or not Robert had any other drug problems?

A. Yes.

Q. And what was that?

A. Pills.

Q. What kind of pills?

A. Morphine, OxyContin, hydros, just about all of them.

Q. How long did that problem last?

A. A couple of years.

Q. Was there a time when Robert stopped using the pain pills?

A. When he ran out.

Q. And let me ask you this, did you know that Robert was also using crack cocaine?

A. I did not.

MS. BOLTON: Objection, Your Honor, that is leading.

MS. HUNT: Did you know, the answer is either yes or no. It doesn't suggest the answer, Your Honor.

THE COURT: I am going to overrule the objection, but it is close to the line on leading because it does suggest an answer. Go ahead.

Q. Do you know whether or not Robert used crack cocaine?

A. I don't know.

Q. Now, were you aware that crack cocaine was found in the house?

A. I was.

[284]

Q. And what was your reaction to that?

A. I thought he started using crack.

Q. And what made you think that?

A. Well, when I found out it was there, his attitude the week before told me he was on something, but I knew that it wasn't pills anymore so I figured that is what it was.

MS. BOLTON: Your Honor, I object and move to strike. Obviously it has come in and been presented to the jury, but there has been no foundation laid for this testimony and this witness isn't qualified -- she has not been qualified to give this opinion.

MS. HUNT: Well, Your Honor, if I may be heard.

THE COURT: You may.

MS. HUNT: She is giving a lay opinion on what she saw before and then what she saw after and then what she believed was the case after she was told what was found in the house and I think she is --

MS. BOLTON: And what she believed --

THE COURT: One at a time.

MS. HUNT: I think she is entitled to give a lay opinion as to that based on what she saw of Mr. Norwood's behavior.

THE COURT: Miss Bolton.

MS. BOLTON: What she believed is a lay opinion, not familiar -- or with any foundation as to what crack cocaine

[285]

does to an individual. It is not relevant and it is not appropriate for this jury. No foundation has been laid for that, and her opinion is not relevant as a result.

THE COURT: The question really is consumption of drugs, and that is what we are involved with here and the opinion is not being offered as that of an expert as I have understood it. The objection is overruled.

MS. HUNT: Thank you, Your Honor.

Q. So did you think that Robert was -- did you come to the opinion that Robert must have been using crack cocaine?

A. Yes.

MS. BOLTON: Objection, leading.

MS. HUNT: Your Honor, I am just rephrasing the question after the objection.

THE COURT: Overruled, but they need to be --

MS. HUNT: I will move on.

THE COURT: Yes, let's move on.

Q. Now, have you ever known Robert Norwood to sell drugs?

A. No.

Q. Have you ever known him to sell marijuana?

A. No.

Q. Or to sell crack cocaine?

A. No.

Q. Or to sell anything else?

A. No.

[286]

Q. You said -- how often would you see Robert during that four year period?

A. Every day.

Q. Okay. And during that every day period, where did you see Robert?

A. Home.

Q. Okay. At whose home?

A. Either one of our homes.

Q. Okay. And can you tell me about whether or not people were coming and going from your house?

A. No, they weren't.

Q. Did you and Robert have cell phones?

A. Yes.

Q. And were there cell phones in the house on the day of April 30th?

A. Yes.

Q. Do you know what happened to those cell phones?

A. I believe his got taken. I had mine with me.

Q. Okay. Let me ask you this also, there has been some -- well, let me just show it to you.

* * *

[288]

Rebecca Holiday/Direct Examination

* * *

Q. Okay. Do you know whether or not Robert was working?

A. Part-time.

Q. And what was he doing part-time?

A. He --

MS. BOLTON: Your Honor, I am going to object. If I could just examine the witness in aid of an objection?

THE COURT: What is the objection?

MS. BOLTON: Well, if her response is based on what the defendant told her, then it would be a hearsay response.

THE COURT: I think that can come out in cross-examination.

MS. BOLTON: Okay. The government's objection is hearsay.

THE COURT: All right.

Q. Do you know --

THE COURT: Overruled.

MS. HUNT: Can she answer the question?

THE COURT: She can. Overruled.

Q What did he do?

[289]

A. He cleaned out rentals that people had moved out of.

Q. Do you know if Robert had ever worked for Colvico?

A. Yes.

Q. And let me ask you this, there has been the question of a large amount of money that was found in the house?

A. Yes.

Q. Do you know what access to funds Robert had in terms of cash?

A. What access he has?

Q. Well, let me ask you this. That is not a good way to ask it. Let me ask it this way, did Robert have a bank account?

A. No.

Q. And as a result of not having a bank account, do you know what he did with his money?

A. No.

Q. Do you know whether or not he ever had a retirement fund, a retirement account?

A. I am not sure really.

Q. Okay. And were you of the impression that he had cashed out a retirement account from Colvico?

MS. BOLTON: Your Honor, I am going to object, this is leading.

THE COURT: Sustained. You need to re ask the question in a different format.

Q. All right. Do you know, because I don't think that is

[290]

leading, do you know, the answer is either yes or no, Your Honor, whether or not Robert cashed a retirement fund check?

A. Yes.

Q. Do you know how much it was for?

MS. BOLTON: Your Honor, objection. Again, this is going to call for a hearsay response. If I could examine the witness in aid of an objection?

THE COURT: I think at this point I am going to allow that. Go ahead.

VOIR DIRE EXAMINATION

BY MS. BOLTON:

Q. Miss Holiday, we know what the question is, it is about a check that maybe you saw at some point. Is that the basis for your opinion?

A. Yes.

Q. As to whether or not it was cashed?

A. Yes.

Q. So your testimony is based on a document that you saw, right?

A. Right.

Q. And you don't have that document here with you today?

A. No.

Q. And was it based also on something the defendant told you?

A. He showed it to me, he didn't say he cashed it.

MS. BOLTON: Again, our objection is hearsay.

[291]

THE COURT: Well, at this point, it appears that the answer to the question would suggest that hearsay is not the basis that I can sustain, so I am going -- at least based on that answer, overruled.

DIRECT EXAMINATION - CONTINUED

BY MS. HUNT:

Q. So do you know whether or not Robert -- well, let me ask you this, tell us the document that you saw?

A. It was a check.

Q. Okay. And do you remember how much it was for?

MS. BOLTON: Your Honor, again, objection, hearsay. She is giving a statement about an out-of-court document and it is being offered for its truth.

MS. HUNT: She is explaining what she saw, Your Honor.

THE COURT: Overruled. That is correct, she is indicating what she saw.

MS. HUNT: Right, and quite frankly, Your Honor, the government opened the door to this in asking her about the document.

Q. Do you remember how much it was for?

A. It was over 5,000 dollars.

Q. Did you ever see that check again?

A. I did.

Q. And do you remember about when that was?

[292]

A. About a month later.

Q. And do you remember what this time period was that you saw that check?

A. It was I believe October and November.

Q. Of 2005?

A. Yes.

Q. Okay. Now, after that, you said Mr. Norwood did not have a checking account?

A. Right.

Q. Okay. Do you know whether or not Mr. Norwood ever cashed checks at places -- different places?

A. Yes.

Q. And primarily where would he cash those checks if you know?

MS. BOLTON: Your Honor, I am going to object. The testimony that is being elicited is based on statements the defendant made to her, and I would

like to lay some foundation for that if I could, or simply object that it is hearsay based testimony.

MS. HUNT: Let me rephrase the question.

THE COURT: Yes.

Q. Of your own personal knowledge, okay, something that you saw, do you know where Robert would cash his checks?

A. I don't know.

Q. Okay.

* * *

[297]

Rebecca Holiday /Redirect Examination

* * *

Q. -- do you remember that? Let me ask you this, did Robert gamble?

A. Yes.

Q. And how often would he gamble?

A. At least once a week.

Q. How successful was he at that?

A. I would say --

MS. BOLTON: Your Honor, I would object, this is beyond the scope of the cross.

THE COURT: Well, the issue has been income and the sources of income both on direct and cross so I am going to allow it.

MS. BOLTON: I am going to object to an opinion as to success in gambling.

THE COURT: Overruled.

Q. How successful was he?

A. More successful than not.

Q. Okay. Let me ask you this, do you know what Robert would do with his winnings, or with any of his money?

A. Pay his bills.

Q. Okay. Was there an event that was coming up that you know that specifically that Robert was saving for?

A. Yes.

Q. What was that event?

[298]

A. His daughter, Monique (phonetic), coming from Australia.

Q. And what was he saying to do?

A. Pay for her air fare, passport, and while she was here.

Q. The marijuana, you admitted to this jury that you have smoked it?

A. Right.

Q. Right, and you have admitted to this jury that you had smoked some of Robert's marijuana?

A. Right.

Q. Did you also purchase marijuana?

A. No.

Q. Ever?

A. Probably in my lifetime, yes.

MS. HUNT: That is all.

THE COURT: Thank you, Miss Hunt. Any recross?

MS. BOLTON: No, Your Honor.

THE COURT: All right. You may step down. Thank you. You may call your next witness.

* * *

[304]

Judge Lonny R. Suko/Motion for a Judgment of Acquittal

* * *

I am going to send this matter to the jury. It is not the duty of the court to stand in the way of credibility determinations where there is reasonable evidence that might be considered.

I would say editorially that this is a case in which the normal facts that show up seem to be closer to the edge rather than heavy duty.

Stated differently, the Alaska case, for example, where there was no evidence of sale involved a much more -- a less attenuated degree of evidence.

In other words, they found multiple weapons. There was evidence of drug manufacture. There was drugs found out and about in the place. There was lots of ammunition.

In this case, this is a much, much closer question, and we may yet revisit this matter again. If this were a civil case, I would be telling the parties to take a good hard look at settling the case.

Obviously I am not going to do that because it is a criminal case and I can't do it, although it is one perhaps the parties might have taken a different look at.

I am going to take it under advisement. I am not going to rule in advance of the jury decision at this juncture, and I will rule promptly thereafter.

[321]

Prosecution/Closing Arguments

What we introduced to you was evidence that the Department of Employment Security when someone works a legitimate job, employer reports their income and there is evidence that they have been employed for a period of time.

We know from the evidence in this case and what was introduced as to the defendant, that he hasn't worked in a legitimate job in Washington State since at least 2004.

So how is it that you don't have a job since 2004, you have got a house, you have got a couple of cars, you have got drugs, you have got a gun, you have got kids apparently you are paying for, and you have got that much cash?

Just inexplicable. There has been no reasonable explanation for that except that he was involved in drug trafficking.

A thousand dollars in his wallet, 15 hundred and 30 dollars cash in his pocket and those bindles right there next to it.

Now, maybe that day he went out with four or five bindles and that is why he came back with so much cash in that pocket. That is what fits.

* * *

[330]

Defense/Closing Arguments

* * *

Now, we do know there was some crumbles on or near that little metal plate where the scale was. What do you think that was for?

Don't you think that that is because somebody crumbled it up to put to lace their marijuana roll with. Is there evidence of anything else in this case? No, there is not.

So what kind of weight, what kind of stone of evidence is the scale? It is simply not evidence of anything. Something else Rick Taylor said that was very interesting. He said, you know, dealers weigh it because they don't want to short anybody because if you short someone, if you short your customer, you could be in a world of hurt.

Well, now, how would a customer know if he has been shorted unless he weighed it. He would have to weigh it to know he had been shorted.

So why is it inconceivable that a user would have a scale? Why doesn't the government make that argument? Especially if you are buying Costco style marijuana.

Remember what Rick Taylor said, the more you buy, the cheaper it is. The heavier user you are, the more you use it. The more you use it, the more expensive it is, the more it makes sense to buy an ounce and a half as opposed to run out and by a rock of crack every time you want to smoke crack.

* * *

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT LEWIS NORWOOD,
Defendant.

Case No. CR 06-091-LRS-1
Date: October 29th–31st, 2007
Spokane, Washington

Transcript of Jury Trial Proceedings

BEFORE THE HONORABLE LONNY R. SUKO

Appearances:

For the Plaintiff: Ms. Katherine Bolton
Assistant US Attorney
PO Box 1494
Spokane, Washington 99210

For the Defendant: Ms. Christina Hunt
Federal Public Defender
North Post
Suite 700
Spokane, Washington 99210

* * *

[5]

Judge Lonny R. Suko/Sentencing Hearing

* * *

THE COURT: All right. It is the Court's understanding that I have no choice in this matter; that I'm bound by the law; that I cannot impose a sentence different than that which is mandated in the minimum in this case. Count 2 brings a mandatory 120-month sentence and Count 3 brings a mandatory consecutive 60-month sentence, for a total of 180 months.

The guideline provisions that we purportedly start with in analyzing any sentence would provide for a total offense level of 26, a criminal history score of 7; and on the mandatory penalty count for Count 3, there would be a five-year sentence. The criminal history score is category IV. The 3553(a) factors that the Court would ordinarily analyze and apply do not apply in this case because the Legislature, through the Executive Branch, has mandated that the Court impose the sentence that is specified specifically in the law. So there's basically, as I understand the current state of the law, no discretion. If there were discretion, the Court might perhaps analyze this case differently.

I note that you're 53 years of age. You've had brushes

[6]

with the law in the past. In this case, the convictions that you face will result in you being roughly 68 years of age or thereabouts before you can get out of

prison, unless there is a difference that's applied or a change in the law or a different view of this case taken by the Court of Appeals.

Taking into account all of the matters that the Court has to consider, I am going to impose sentence as follows: Pursuant to 18 U.S. Code, Section 3553(a), considering the sentencing guidelines as best I can in the circumstances that confront us, it is the judgment of the Court that you are hereby committed to the custody of the United States Bureau of Prisons, to be imprisoned for a term of 180 months. This term consists of 120 months on Count 2 and 60 months on Count 3. In accordance with 18 U.S. Code, Section 924(c)(1)(D)(ii), the penalty for Count 3 must run consecutive to any sentence imposed; and I hereby impose that sentence.

* * *

[LOGO]
Employment Security Department
WASHINGTON STATE
PO Box 9046 Olympia, WA 98507-9046

CERTIFICATION

RE: ROBERT NORWOOD
SSN: 538-56-8614

I, Jody Arndt, Assistant Records Officer, of the Employment Security Department, of the State of Washington and custodian of the department records, do hereby certify that a diligent search of the department's files failed to disclose any record of wages reported for the above named individual from January 1, 2004 through March 31, 2007.

Dated on August 8, 2007.

/s/ Jody Arndt
Jody Arndt

STATE OF WASHINGTON
COUNTY OF THURSTON

On August 8, 2007, personally appeared before me, Jody Arndt, to me known to be the Assistant Records Officer for the Employment Security Department.

/s/ Shalina Rae Combes
Notary Public in and for the
State of Washington
Residing at County of Thurston
My Commission Expires 2010
[NOTARY PUBLIC SEAL]